RECORD AND BRIEFS

No: 15-8544

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

TRAVIS BECKLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED
MAR 09 2016
OFFICE OF THE CLERK

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Travis Beckles, pursuant to SUP CT. R. 39.1, respectfully moves for leave to file the accompanying petition for writ of certiorari in the Supreme Court of the United States without payment of costs and to proceed *in forma pauperis*.

Petitioner was previously found financially unable to obtain counsel and the Federal Public Defender of the Southern District of Florida was appointed to represent Petitioner pursuant to 18 U.S.C. § 3006A. Therefore, in reliance upon RULE 39.1 and § 3006A(d)(6), Petitioner has not attached the affidavit which would otherwise be required by 28 U.S.C. § 1746.

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

Fort Lauderdale, Florida
March 9, 2016

By: _____
Janice L. Bergmann
Assistant Federal Public Defender
Court Assigned No. A5500685
1 East Broward Blvd., Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436

RECEIVED
MAR 14 2016
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Library of Congress
Law Library

NO: 15-8544

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

TRAVIS BECKLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender

Janice L. Bergmann*
Assistant Federal Public Defender
* *Counsel of Record*

One East Broward Blvd., Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436

Counsel for Petitioner

ORIGINAL

Supreme Court, U.S.
FILED
MAR 09 2016
OFFICE OF THE CLERK

RECEIVED
MAR 14 2016

QUESTIONS PRESENTED FOR REVIEW

Johnson v. United States, 135 S. Ct. 2551 (2015), deemed unconstitutionally vague the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) (defining "violent felony"). The residual clause invalidated in *Johnson* is identical to the residual clause in the career-offender provision of the United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2) (defining "crime of violence").

The questions presented are:

1. Whether *Johnson* applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in U.S.S.G. § 4B1.2(a)(2)?

2. Whether *Johnson*'s constitutional holding applies to the residual clause in U.S.S.G. § 4B1.2(a)(2), thereby rendering challenges to sentences enhanced under it cognizable on collateral review?

3. Whether mere possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in the commentary to U.S.S.G. § 4B1.2, remains a "crime of violence" after *Johnson*?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

INTERESTED PARTIES ii

TABLE OF AUTHORITIES vi

PETITION 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTORY AND OTHER PROVISIONS INVOLVED 3

INTRODUCTION 5

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 13

I. Whether *Johnson* applies retroactively in the context of the Guidelines's residual clause presents an important question warranting this Court's prompt consideration 13

A. Prompt resolution of the retroactivity question will help avoid confusion in the lower courts and the needless expenditure of scarce judicial resources 13

B. Whether *Johnson* applies retroactively to Guidelines cases is a question of great public importance 17

C. This petition presents an ideal vehicle for the Court to decide whether *Johnson* applies retroactively to all Guidelines cases 19

II. Whether *Johnson*'s constitutional holding applies to U.S.S.G. § 4B1.2(a)(2)'s residual clause – that is, whether *Johnson* claims are cognizable in Guidelines cases – presents an important question warranting this Court's prompt intervention 20

A. The reasons compelling resolution of the retroactivity question this Term equally compel resolution of the cognizability question this Term 20

B. The circuits are divided on whether *Johnson* applies to the Guidelines's residual clause 21

C. The Eleventh Circuit's anomalous decision is clearly wrong 22

D. This petition squarely presents the cognizability issue 26

III. Whether possession of a sawed-off shotgun remains a "crime of violence" after *Johnson* because it is listed in the commentary to U.S.S.G. § 4B1.2 is an important question warranting this Court's resolution 28

A. The circuits are divided as to whether, post-*Johnson*, the "unlawful possession of a firearm described in 26 U.S.C. § 5845(a)" is a "crime of violence" for purposes of § 4B1.2 because it is expressly listed as such in the commentary to that Guideline 28

B. There is a longstanding division in the circuits as to whether the commentary to U.S.S.G. § 4B1.2 has freestanding definitional power, or whether offenses listed as "crimes of violence" in the

commentary must instead satisfy one of the definitions in the guideline's text 32

C. This case squarely presents whether possession of a sawed-off shotgun remains a "crime of violence" after *Johnson* 34

CONCLUSION 35

TABLE OF AUTHORITIES

CASES:

Beckles v. United States,

135 S.Ct. 2928 (2015) 11

Beckles v. United States,

No. 14-7390, Cert. Ptn. (U.S. filed Dec. 2, 2014) 10

Beckles v. United States,

130 S.Ct. 272 (2009) 8

Beckles v. United States,

616 Fed. Appx. 415 (11th Cir. 2015) 11, 27, 29

Begay v. United States,

553 U.S. 137 (2008) 14

Brown v. Caraway,

719 F.3d 583 (7th Cir. 2013) 15

Chambers v. United States,

555 U.S. 122 (2009) 14

Denson v. United States,

804 F.3d 1339 (11th Cir. 2015), *cert. denied*,

___ S.Ct. ___, 2016 WL 763612 (Feb. 26, 2016) 25

Dodd v. United States,

545 U.S. 353 (2005) 13

Hill v. United States,

368 U.S. 424 (1962) 20

In re Gilberto Rivero,

No. 15-7776 (U.S. filed January 14, 2016) 19

Johnson v. United States,

135 S.Ct. 2551 (2015) ..... *passim*

Narvaez v. United States,

674 F.3d 621 (7th Cir. 2011) 14

Peugh v. United States,

133 S.Ct. 2072 (2013) 23-24

Reina-Rodriguez v. United States,

655 F.3d 1182 (9th Cir. 2011) 15

Rozier v. United States,

701 F.3d 681 (11th Cir. 2012) 15

Spencer v. United States,

773 F.3d 1132 (11th Cir. 2014) (*en banc*) 15, 20

Stinson v. United States,

508 U.S. 36 (1993) 9, 30

Tyler v. Cain,

533 U.S. 656 (2001) 17

United States v. Armijo,

651 F.3d 1226 (10th Cir. 2011) 33

United States v. Alfrederick Jones,

No. 14-2882 (3d Cir. reh'g denied Jan. 22, 2016) 20

United States v. Beckles,

565 F.3d 832 (11th Cir. 2009) 2, 8

United States v. Brown,

___ Fed. Appx. ___, 2015 WL 9301410 (11th Cir. Dec. 22, 2015) 25

United States v. Carthorne,

726 F.3d 503 (4th Cir. 2013) 23

United States v. Casamayor,

___ Fed. Appx. ___, 2016 WL 722892 (11th Cir. Feb. 24, 2016) 25

United States v. Collins,

624 Fed. Appx. 725 (11th Cir. 2015) 25

United States v. Doe,

810 F.3d 132 (3d Cir. 2015) 14

United States v. Dixon,

622 Fed. Appx. 892 (11th Cir. 2015) 25

United States v. Grayer,

625 Fed. Appx. 313 (6th Cir. 2015) 22, 25

United States v. Hall,

714 F.3d 1270 (11th Cir. 2013) 9-12, 26-27, 32

United States v. Hawkins,

554 F.3d 615 (6th Cir. 2009) 31, 33

United States v. Hood,

628 F.3d 669 (4th Cir. 2010) 31, 33

United States v. Kirk,

___ Fed. Appx. ___, 2016 335937 (11th Cir. Jan. 28, 2016) 25

United States v. Lipscomb,

619 F.3d 474 (5th Cir. 2010) 31, 33

United States v. Madrid,

805 F.3d 1204 (10th Cir. 2015) 21, 24

United States v. Madrid,

U.S. Brief, 2015 WL 4985890 (10th Cir. August 2015) (No. 14-2159) 23

United States v. Maldonado,

___ Fed. Appx. ___, 2016 WL 229833 (2d Cir. 2016) 22

United States v. Marrero,

743 F.3d 389 (3d Cir. 2014) 32

United States v. Matchett,

802 F.3d 1185 (11th Cir. 2015) 11, 21-27, 29

United States v. McDonald,

592 F.3d 808 (7th Cir. 2010) 23

United States v. Raupp,

617 F.3d 756 (7th Cir. 2012) 33

United States v. Smith,

73 F.3d 1414 (6th Cir. 1996) 24

United States v. Soto-Rivera,

811 F.3d 53 (1st Cir. 2016) 20, 22, 29-30, 33

United States v. Taylor,

803 F.3d 931 (8th Cir. 2015) 22, 25

United States v. Tichenor,

683 F.3d 358 (7th Cir. 2012) 23-24

United States v. Townsend,

___ Fed. Appx. ___, 2015 WL 9311394 (3d Cir. Dec. 23, 2015) 22

United States v. Walker,

___ Fed. Appx. ___, 2015 WL 7074646 (11th Cir. 2015) 25

United States v. Whitson,

587 F.3d 1218 (11th Cir. 2010) 23

United States v. Williams,

559 F.3d 1143 (10th Cir. 2009) 23

United States v. Williams,

110 F.3d 50 (9th Cir. 1997) 33

United States v. Wivell,

893 F.3d 156 (8th Cir. 1990) 24-25

Welch v. United States,

No. 15-6418 (U.S. cert. granted Jan. 8, 2016) 5-6, 12, 14-15

STATUTES AND SENTENCING GUIDELINES:

Part III of the Rules of the Supreme Court of the United States 2

18 U.S.C. § 922(g)(1) 6

18 U.S.C. § 924(e) 8

18 U.S.C. § 924(e)(2)(B) 3

18 U.S.C. § 924(e)(2)(B)(ii) i

26 U.S.C. § 5845(a) 7, 9, 28-29

26 U.S.C. § 5861(d) 10

28 U.S.C. § 994(h) 7, 19

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2255 ..... *passim*

28 U.S.C. § 2255(f) 13

28 U.S.C. § 2255(f)(3) 13

28 U.S.C. § 2255(h)(2) 17, 19

U.S.S.G. § 2K1.3 18

U.S.S.G. § 2S1.1 18

U.S.S.G. § 3E1.1 4

U.S.S.G. § 4A1.1(e) 18

U.S.S.G. § 4A1.2(p) 18

U.S.S.G. § 4B1.1 ..... 7-8, 11, 18

U.S.S.G. § 4B1.1(a) 3, 34

U.S.S.G. § 4B1.2 ..... *passim*

U.S.S.G. § 4B1.2(a) 6, 8-10, 30

U.S.S.G. § 4B1.2(a)(1) 30, 32-33

U.S.S.G. § 4B1.2(a)(2) ..... *passim*

U.S.S.G. § 5K2.17 18

U.S.S.G. § 7B1.1(a)(1) 18

U.S.S.G. § App. C, amend. 674 (Nov. 1, 2004) 7

OTHER AUTHORITIES:

Leah M. Litman, *Residual Impact: Resentencing Implications of Johnson's Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. Sidebar 55, 56 (2015) 18

U.S. Sentencing Comm'n, *Proposed Amendment: "Crime of Violence" and Related Issues* (Jan. 8, 2016), available at www.ussc.gov. 12

U.S. Sentencing Comm'n, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing*, pt. C: Career Offenders, at 9 (Dec. 2012) 18

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

No:

TRAVIS BECKLES,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Travis Beckles respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's unpublished opinion reaffirming its denial of Mr. Beckles's 28 U.S.C. § 2255 motion to vacate judgment notwithstanding *Johnson v. United States*, 135 S. Ct. 2551 (2015), is reported at 616 Fed. Appx 415 (11th Cir. 2015), and included in the Appendix at A-1. The Eleventh Circuit's unreported order denying Mr. Beckles's petition for rehearing en banc is included in the Appendix at A-2.

This Court's decision granting Mr. Beckles's petition for writ of certiorari, vacating the Eleventh Circuit's prior decision denying his § 2255 motion, and remanding for reconsideration in light of *Johnson* is reported at 135 S. Ct. 2928 (2015), and included in the Appendix at A-3. The Eleventh Circuit's unpublished pre-*Johnson* opinion affirming the denial of Mr. Beckles's § 2255 motion is reported at 579 Fed. Appx. 833 (11th Cir. 2014), and included in the Appendix at A-4.

The District Court's unpublished order granting the government's motion for reconsideration and denying Mr. Beckles's § 2255 motion is included in the Appendix at A-5. The District Court's unpublished order granting Mr. Beckles's § 2255 motion and ordering resentencing is included in the Appendix at A-6. The magistrate judge's unpublished report recommending denial of Mr. Beckles's § 2255 motion is included in the Appendix at A-7.

The Eleventh Circuit's published opinion affirming Mr. Beckles's conviction and sentence on direct appeal is reported at 565 F.3d 832 (11th Cir. 2009), and included in the Appendix at A-8.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming the district court's denial of Mr. Beckles's 28 U.S.C. § 2255 motion was entered on September 29, 2015. The court of appeals denied Petitioner's timely petition for rehearing *en banc* on February 11, 2016. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

Section 924(e)(2)(B) of Title 18 states, in pertinent part:

§ 924. Penalties

* * *

(e)(2) As used in this subsection –

* * *

(B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, , that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; ...

18 U.S.C. § 924(e)(2)(B).

United States Sentencing Guideline 4B1.1(a) states, in pertinent part:

§ 4B1.1. Career Offender

(a) **A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.**

(b) **Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.**

Offense Statutory Maximum	Offense Level*
(A) Life	37

(B)	25 years or more	34
(C)	20 years or more, but less than 25 years	32
(D)	15 years or more, but less than 20 years	29
(E)	10 years or more, but less than 15 years	24
(F)	5 years or more, but less than 10 years	17
(G)	More than one year, but less than 5 years	12.

*If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

U.S.S.G. § 4B1.1(a).

United States Sentencing Guideline 4B1.2 states, in pertinent part:

§ 4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

* * *

Commentary

Application Notes:

1. For purposes of this guideline –

* * *

Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a "crime of violence."

* * *

U.S.S.G. § 4B1.2.

INTRODUCTION

Johnson v. United States, 135 S. Ct. 2551 (2015), held unconstitutionally vague the residual clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii). In *Welch v. United States*, No. 15-6418 (U.S. cert. granted Jan. 8, 2016), this Court will decide whether *Johnson* announced a new "substantive" rule of constitutional law retroactively applicable to cases on collateral review. *Welch*, however, will consider that issue in the context of a 28 U.S.C. § 2255 motion brought by a federal prisoner challenging an ACCA-enhanced sentence. This petition presents the closely-related question whether *Johnson* applies retroactively to collateral cases brought by federal prisoners, like Petitioner, who challenge federal sentences enhanced under the identically-worded and analytically-indistinct residual clause contained in the United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2).

Specifically, this petition presents three critical questions requiring the Court's prompt resolution: (1) whether *Johnson* applies retroactively in the context of the Guidelines's residual clause; (2) whether *Johnson* renders the Guidelines's residual clause void for vagueness, such that *Johnson*-based challenges in that context are cognizable in § 2255 proceedings; and (3) whether, post-*Johnson*, a federal sentence may nonetheless be enhanced for mere possession of a sawed-off shotgun because that offense is listed as a crime of violence in the Guidelines commentary.

Prompt resolution of these issues is required because the one-year statute of limitations governing collateral *Johnson* claims will expire on June 26, 2016. Given

the looming statute of limitations, the Court should resolve these issues this Term for many of the same reasons it granted *certiorari* and expedited briefing in *Welch*. Indeed, depending on the Court's decision in *Welch*, a *per curiam* opinion on these issues without full briefing or oral argument may be appropriate. Regardless, this petition affords the Court an opportunity to decide all three of these important questions this Term, and thereby provide critical guidance to lower courts likely to be confronted between now and June 26, 2016 with thousands of § 2255 motions filed by federal prisoners whose sentences were enhanced using the Guidelines's residual clause.

STATEMENT OF THE CASE

1. In 2007, after a Miami detective placed Mr. Beckles in a police car outside his girlfriend's apartment, the girlfriend asked the detective to remove a gun from the bedroom. The detective searched the bedroom but was unable to find a gun. After questioning Mr. Beckles, the detective again searched the bedroom but was still unable to find a gun. Finally, the detective took Mr. Beckles into the apartment, and Mr. Beckles helped the officer recover a shotgun from under a mattress. A jury later convicted Mr. Beckles of one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

2. The Presentence Investigation Report concluded that the unlawful possession of a sawed-off shotgun qualified as a "crime of violence," under U.S.S.G. § 4B1.2(a), and because Mr. Beckles had two prior felony convictions (for controlled

substance offenses that are not at issue in the instant petition), his sentence should be enhanced under the career offender provision found in U.S.S.G. § 4B1.1.

Possession of a sawed-off shotgun is listed as a "crime of violence" not in the text of the guideline itself, but in the commentary found in Application Note 1 to § 4B1.2. That commentary states, in pertinent part, that "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence' " U.S.S.G. § 4B1.2 cmt. n.1. That offense was included as a "crime of violence" in the commentary to § 4B1.2 in 2004 by the United States Sentencing Commission because, at that time, "[a] number of courts ha[d] held that possession of certain . . firearms, such as a sawed-off shotgun, is a 'crime of violence' due to the serious potential risk of physical injury to another person." U.S.S.G. App. C, amend. 674 (Nov. 1, 2004).

When Congress established the Sentencing Guidelines and the United States Sentencing Commission, it directed the Commission to "assure that the guidelines" for prisoners who qualify as career offenders "specify a sentence to a term of imprisonment at or near the [statutory] maximum authorized." 28 U.S.C. § 994(h). Section 4B1.1 of the Sentencing Guidelines implements this directive. *See* U.S.S.G. § 4B1.1 & cmt. n.3. As a result, the career offender enhancement dramatically escalates federal sentencing ranges under the Sentencing Guidelines. Here, Mr. Beckles's guideline imprisonment range without the career offender enhancement was 180 months.[1] As a career offender,

---

[1] Mr. Beckles's guideline sentencing range was 180 months because the PSI also concluded that he had three prior drug offenses that required imposition of a

his guideline imprisonment range increased to 360 months to life, and the district court sentenced him to a 360-month term of imprisonment.[2]

3. On direct appeal, the United States Court of Appeals for the Eleventh Circuit rejected Mr. Beckles's argument that his sentence was wrongly enhanced under the career offender provision in § 4B1.1 because possession of a sawed-off shotgun is not a "crime of violence" under § 4B1.2(a). *United States v. Beckles*, 565 F.3d 832, 842-44 (11th Cir. 2009). In reaching this conclusion, the court of appeals relied upon the commentary found in Application Note 1 to § 4B1.2. *See id.* at 842. This Court denied Mr. Beckles's petition for writ of certiorari. *Beckles v. United States*, 130 S. Ct. 272 (2009).

4. Mr. Beckles timely filed a 28 U.S.C. § 2255 motion to vacate sentence in which he argued that possession of a sawed-off shotgun is not a "crime of violence" under § 4B1.2(a) and he was therefore wrongly sentenced as a career offender. The motion was referred to a magistrate judge who issued a report recommending that the motion be denied because Mr. Beckles's challenge to his career offender enhancement was not cognizable in a § 2255 motion. App. A-7 at 13-34. In March 2013, however, the district court sustained Mr. Beckles's objections to the magistrate judge's report, and determined that Mr. Beckles's challenge was cognizable. App. A-3, *passim*.

---

mandatory-minimum 15-year sentence as an armed career criminal under 18 U.S.C. § 924(e). Mr. Beckles's ACCA enhancement is not at issue in this petition.

[3] The district court later reduced Mr. Beckles's term of imprisonment to 216 months for reasons not relevant here.

Because the government had not contested Mr. Beckles's argument that possession of a sawed-off shotgun did not qualify as a crime of violence under U.S.S.G. § 4B1.2(a), *id.* at 11, the district court concluded that Mr. Beckles's sentence was wrongly enhanced under the career offender provision, granted the motion, *id.* at 18, and ordered that Mr. Beckles be resentenced without the career offender enhancement.

While Mr. Beckles awaited resentencing by the district court, however, the Eleventh Circuit decided *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013). *Hall* held U.S.S.G. § 4B1.2's commentary stating that possession of a sawed-off shotgun qualifies as a "crime of violence" is binding on the federal courts under *Stinson v. United States*, 508 U.S. 36 (1993):

> Although we would traditionally apply the categorical approach to determine whether an offense qualifies as a "crime of violence," we are bound by the explicit statement in the commentary that "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off shotgun .) is a 'crime of violence.'" U.S.S.G. § 4B1.2 cmt. n.1. Hall does not satisfy either of *Stinson*'s stringent exception requirements, as the commentary provision violates neither the Constitution nor any other federal statute, and it is not inconsistent with, or a plainly erroneous reading of, the guideline text itself. Moreover, because the commentary to § [4B1.2] defines "crime of violence" very differently than the ACCA does, we cannot say that the definition of 'crime of violence' provided in the commentary to § [4B1.2] is a plainly erroneous reading of the guideline.

Id. at 1274 (first ellipsis added; internal quotation marks omitted).

The government moved the district court to reconsider its decision granting Mr. Beckles's § 2255 motion in light of *Hall*. On June 14, 2013, the district court granted

reconsideration, set aside its prior final judgment in Mr. Beckles's § 2255 proceeding, and denied his § 2255 motion. App. A-5.

5. Mr. Beckles appealed the denial of his § 2255 motion to the Eleventh Circuit, and argued that possession of a sawed-off shotgun is not a "crime of violence" under § 4B1.2(a). He acknowledged, however, the prior contrary ruling in *Hall*. On September 5, 2014, the Eleventh Circuit issued a *per curiam* opinion affirming the district court's denial of Mr. Beckles's § 2255 motion, noting that it had already ruled on the issue in *Hall*:

> In *Hall*, we decided that possession of an unregistered sawed-off shotgun, as defined by 26 U.S.C. § 5861(d), qualifies as a 'crime of violence' under § 4B1.2(a), based on the commentary to that guideline provision. *Hall*, 714 F.3d at 1273. We explained that the commentary was controlling because the commentary did not violate the Constitution or federal statute, and was not inconsistent with, or a plainly erroneous readying of, the guideline text. *Id.* at 1273-74.
>
> Here, Beckles's claim fails on the merits under *Hall*, and we are bound by that decision.

App. A-4 at 4.

6. After this Court granted review in *Johnson* on the question of whether possession of a sawed-off shotgun was a "violent felony" under the ACCA, Mr. Beckles petitioned for writ of certiorari on the closely-related question of whether that same offense qualified as a crime of violence under § 4B1.2(a)(2). *See Travis Beckles v. United States*, No. 14-7390, Cert. Ptn. at i (U.S. filed Dec. 2, 2014). After this Court decided *Johnson*, it granted the writ, vacated the Eleventh Circuit's judgment, and

remanded Mr. Beckles's case to the court of appeals for further consideration in light of that decision. *Beckles v. United States*, 135 S. Ct. 2928 (2015); App. A-3.

7. Post-*Johnson*, but before it considered Mr. Beckles's case on remand, the Eleventh Circuit effectively limited the scope of collateral relief available to federal prisoners under that decision by holding that the Sentencing Guidelines cannot be unconstitutionally vague, and thus rejected a *Johnson*-based challenge to the residual clause in U.S.S.G. § 4B1.2(a)(2). *See United States v. Matchett*, 802 F.3d 1185, 1194-96 (11th Cir. 2015), *ptn. for rhg. en banc filed* (October 13, 2015).

8. Eight days after it decided *Matchett*, the Eleventh Circuit again rejected Mr. Beckles's challenge to his career offender sentence. *See Beckles v. United States*, 616 Fed. Appx. 415 (11th Cir. 2015) (*per curiam*); App. A-1. As it did pre-*Johnson*, the court of appeals cited to *Hall* and Application Note 1 in the commentary to § 4B1.2 to support its conclusion that "Beckles's offense of conviction – unlawful possession of a sawed-off shotgun – constitutes a 'crime of violence' under [U.S.S.G. §] 4B1.1." App. A-1 at 2. Without citing *Matchett*, the Eleventh Circuit specifically determined that *Johnson* was inapposite, stating:

> The Supreme Court's decision in *Johnson* – in which the Supreme Court struck down, as unconstitutionally vague, the residual clause of the Armed Career Criminal Act ("ACCA") – does not control this appeal. Beckles was sentenced as a career offender based *not* on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying Beckles's offense as a 'crime of violence.' *Johnson* says and decides nothing about career-offender enhancements under the Sentencing Guidelines or about the Guidelines commentary underlying Beckles's status as a career-offender.

> Our decision in *Hall* remains good law and continues to control this appeal.

App. A-1 at 3.

9. On January 8, 2016, this Court granted the petition for writ of certiorari in *Welch v. United States*, No. 15-6418. *Welch* presents the question whether *Johnson* applies retroactively for purposes of an initial § 2255 motion challenging an ACCA-enhanced sentence.

10. On the same day that this Court granted the petition in *Welch*, the United States Sentencing Commission voted to amend the Sentencing Guidelines by deleting the residual clause from § 4B1.2(a)(2). However, the Commission voted *not* to make that forthcoming amendment retroactively applicable. *See* U.S. Sentencing Comm'n, *Proposed Amendment: "Crime of Violence" and Related Issues* (Jan. 8, 2016), available at www.ussc.gov.

11. On February 11, 2016, the Eleventh Circuit denied Mr. Beckles's timely petition for rehearing *en banc*, and on February 19, 2016, issued its mandate.

REASONS FOR GRANTING THE WRIT

I. Whether *Johnson* applies retroactively in the context of the Guidelines's residual clause presents an important question warranting this Court's prompt consideration.

A. Prompt resolution of the retroactivity question will help avoid confusion in the lower courts and the needless expenditure of scarce judicial resources.

The Court should decide *Johnson*'s retroactivity in the Guidelines context this Term for the same pressing reason it was urged to do so in the ACCA context. Specifically, there is an ever-shortening one-year statute of limitations, requiring federal prisoners to file any *Johnson*-based § 2255 motion by June 26, 2016 – one year from the date *Johnson* was decided. Critically, that deadline remains fixed even if the Court were to hold in a later case that *Johnson* did indeed apply retroactively in the Guidelines context. *See* 28 U.S.C. § 2255(f)(3); *Dodd v. United States*, 545 U.S. 353, 357 (2005). Due to the statute of limitations, it is likely that thousands of federal prisoners whose sentences were enhanced under § 4B1.2(a)(2)'s residual clause will be forced to file § 2255 motions between now and June 26, 2016, in order to preserve their potential right to relief under *Johnson*. Those filings, the vast majority of which would be *pro se*, will place a great strain on the federal judiciary. *See infra*, § I.B. (discussing data).

The retroactivity question takes on added significance in light of the United States Sentencing Commission's proposed amendment to § 4B1.2, which, absent action by Congress, will take effect August 1, 2016. That amendment will delete the residual clause from § 4B1.2(a)(2), but the Commission voted not apply the amendment retroactively. It therefore provides federal prisoners no avenue for relief from their potentially unconstitutional Guidelines sentences.

Welch is unlikely to decide the retroactivity question for those federal prisoners who were sentenced under the Guidelines's residual clause because Welch's *Johnson* claim arises in the ACCA context. Although in *Welch* the government agrees that *Johnson* applies retroactively to ACCA cases on collateral review, it specifically argues that *Welch* "does not present any issue" concerning *Johnson*'s retroactive application to Guidelines cases on collateral review. *Welch v. United States*, No. 15-6418, U.S. Brief at 38 n.9 (U.S. Feb. 9, 2016). And, in its *Welch* brief, the government notes that it has argued to lower courts "that *Johnson* is not entitled to retroactive effect" in Guidelines cases on collateral review because, in its estimation, "the Guidelines are part of the process for imposing sentence, rather than a set of substantive rules that alter the statutory boundaries of sentencing." *Id.* This position, however, is directly contrary to lower court decisions, which have consistently held that new rules narrowing the ACCA's residual clause apply retroactively in Guidelines cases.[3]

---

[3] *See United States v. Doe*, 810 F.3d 132, 154 & n.13 (3d Cir. 2015) (holding that *Begay v. United States*, 553 U.S. 137 (2008), applies retroactively in Guidelines cases); *Narvaez v. United States*, 674 F.3d 621, 625-26 (7th Cir. 2011) (holding that because *Begay* and *Chambers v. United States*, 555 U.S. 122 (2009), announced

It is also directly contrary to the government's own, pre-*Johnson* position in litigation across the country regarding the retroactive application of this Court's ACCA residual clause decisions to Guidelines cases. For example, according to the Appellate Section of the Department of Justice just two years ago, this Court's decision in *Begay* "applies retroactively to ACCA cases, mandatory guidelines cases, and advisory guidelines cases alike." Supplemental Brief for United States on Rehearing En Banc at 48, *Spencer v. United States*, 773 F.3d 1132 (11th Cir. 2014) (*en banc*) (No. 10-10676). Then, the government emphasized that "*Begay*'s status as a substantive rule is fixed," and "does not fluctuate based on whether the prisoner is challenging an ACCA enhancement, a mandatory guidelines enhancement, or, as here, an advisory guidelines enhancement." *Id.* at 15. At that time, the government was "not aware of any such chameleon-like rules" that "were substantive for some purposes and procedural for others." *Id.* at 15. Rather, in the government's pre-*Johnson* estimation, "a rule either is or is not substantive." *Id.*

As a result of the government's newfound position on retroactivity, even if the Court holds in *Welch* that *Johnson* applies retroactively in ACCA cases, there will likely be divergent lower court decisions as to *Welch*'s implications in Guidelines cases.

---

substantive rules, those rules apply retroactively in Guidelines cases); *Brown v. Caraway*, 719 F.3d 583, 594–95 (7th Cir. 2013) (same); *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1189 (9th Cir. 2011) (holding that because its decision limiting the definition of burglary under the ACCA was substantive, it applies retroactively in Guidelines cases); *Rozier v. United States*, 701 F.3d 681 (11th Cir. 2012) ("The government concedes, and we take it as a given, that the Supreme Court's" decision interpreting the ACCA's elements clause "is retroactively applicable" in Guidelines cases.).

In the ACCA context, the courts of appeals divided on whether *Johnson* applied retroactively to both initial and successive § 2255 motions, notwithstanding the government's concession that it did. There is little reason to anticipate greater uniformity in the Guidelines context, where the government opposes retroactivity. And once those the likely divisions among the lower courts occur, the retroactivity question will eventually make its way to this Court. But – absent prompt intervention – it will not arrive until after the statute of limitations has run on June 26, 2016. In the meantime, that issue would be litigated in thousands of cases, likely resulting in confusion in the lower courts, and thousands of federal prisoners left in legal limbo.

Delaying a decision on this critical issue would be particularly troubling given the heightened stakes. If those sentenced under the Guidelines's residual clause are eligible for *Johnson* relief, then many would be entitled to significant relief, including potential release. Those prisoners should not be forced to sit idle through another round of protracted litigation merely to learn whether their *Johnson* claim will be considered on the merits. And federal courts should not be burdened with litigation of the retroactivity question in thousands of cases where this Court could resolve that question once and for all prior to the June 26th deadline, obviating the need to tax the judiciary's scarce resources.

Of course, the one-year statute of limitations does not create an insurmountable obstacle for those federal prisoners who have never filed a § 2255 motion. Those prisoners may file an initial § 2255 motion raising a *Johnson*-based claim before June 26, 2016 and benefit from any subsequent ruling by this Court on retroactivity.

However, those federal prisoners who have filed a previous § 2255 motion may well be precluded from obtaining *Johnson* relief absent a prompt retroactivity decision from this Court. Those in a successive posture must first obtain authorization from the court of appeals before filing a § 2255 motion in the district court, and yet they cannot receive such authorization in the absence of a holding by this Court on the retroactivity question. *See* 28 U.S.C. § 2255(h)(2); *Tyler v. Cain*, 533 U.S. 656 (2001).

Accordingly, if the Court in *Welch* rules that *Johnson* applies retroactively in Guidelines cases, but does so *after* the limitations period elapses on June 26, 2016, any authorization from the court of appeals to file a successive § 2255 motion based on that decision will likely be for naught, because the motion will be deemed untimely. This quandary creates a substantial risk that, unless the Court decides this Term whether *Johnson* applies retroactively not only in the ACCA context, but also in the context of the Sentencing Guidelines, countless federal prisoners in the successive posture who seek to challenge the enhancement of their sentence under the Guidelines's residual clause may be left with no recourse except an original habeas petition filed in this Court. That would place a substantial burden on this Court's limited resources.

B. Whether *Johnson* applies retroactively to Guidelines cases is a question of great public importance.

The judicial efficiency concerns discussed above are particularly acute given the number of prisoners sentenced under § 4B1.2(a)(2)'s residual clause, which dwarfs the total number of prisoners sentenced under the ACCA. It is estimated that only 6,000

prisoners in total have been sentenced under the ACCA. *See* Leah M. Litman, *Residual Impact: Resentencing Implications of Johnson's Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. Sidebar 55, 56 (2015). However, for each year from 1996 to 2011, the number of federal prisoners sentenced as career offenders under § 4B.1.1 ranged from a low of 909 to a high of 2,294, with that number exceeding 2,000 every year since 2006. U.S. Sentencing Comm'n, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing*, pt. C: Career Offenders, at 9 (Dec. 2012). Importantly, these figures do not include the many other federal prisoners who, while not career offenders, were nonetheless sentenced under § 4B1.2(a)(2)'s residual clause, since that clause is incorporated throughout the Guidelines. *See, e.g.*, U.S.S.G. §§ 2K1.3 & cmt. n.2 (explosive materials); 2K2.1 & cmt. n.1 (firearms); 2S1.1 & cmt. n.1 (money laundering); 4A1.1(e) & 4A1.2(p) (criminal history); 5K2.17 & cmt. n.1 (departure for semi-automatic firearms); 7B1.1(a)(1) & cmt. n.2 (probation and supervised release). Thus, the question of whether *Johnson* applies retroactively in Guidelines cases has the potential to affect thousands of federal prisoners who were sentenced under § 4B1.2(a)(2)'s residual clause.

Finally, persons sentenced as career offenders under the Guidelines's residual clause are serving lengthy sentences. *See* 28 U.S.C. § 994(h) (directing the Commission to "assure that the guidelines" for career offenders "specify a sentence to a term of imprisonment at or near the maximum authorized"); U.S.S.G. § 4B1.1 & cmt. n.3 (noting that career offender guideline implements Congress's directive set forth in

§ 994(h)). Mr. Beckles's career-offender designation increased his guideline range by 15 years to life. If *Johnson* applies retroactively to those, like Mr. Beckles, who are sentenced under § 4B1.2(a)(2)'s residual clause, thousands of federal prisoners may be entitled to significant relief.

C. This petition presents an ideal vehicle for the Court to decide whether *Johnson* applies retroactively to all Guidelines cases.

Travis Beckles's petition presents an ideal vehicle for the Court to decide whether *Johnson* applies retroactively to all Guidelines cases. As *Welch* will do for federal prisoners sentenced under the ACCA, this Court's resolution of the retroactivity question in the context of Mr. Beckles's first § 2255 motion will also "make" *Johnson* retroactive (or not) under § 2255(h)(2), and thus also conclusively resolve the retroactivity issue for those federal prisoners raising *Johnson*-based challenges to Guidelines sentences who are litigating second or successive motions.

Moreover, other petitions presenting the question of whether *Johnson* applies retroactively to Guidelines cases are unlikely to be filed this Term because the lower courts are staying both ACCA and Guidelines cases pending the decision in *Welch*. Petitioner is aware of only two other cases, one pending in this Court and one forthcoming, that also present the issue of *Johnson*'s retroactive application in Guidelines cases: *In re Gilberto Rivero*, No. 15-7776 (U.S. filed January 14, 2016), an original habeas matter in which the Court has ordered a response from the United

States that is currently due on April 1, 2016; and *United States v. Alfrederick Jones*, No. 14-2882 (3d Cir. reh'g denied Jan. 22, 2016), a forthcoming petition for writ of certiorari from the Third Circuit's denial of a certificate of appealability. Mr. Beckles urges the Court to accept review in *Rivero* or *Jones* and decide this important issue this Term if it does not do so here.

II. Whether *Johnson*'s constitutional holding applies to U.S.S.G. § 4B1.2(a)(2)'s residual clause – that is, whether *Johnson* claims are cognizable in Guidelines cases – presents an important question warranting this Court's prompt intervention.

A. The reasons compelling resolution of the retroactivity question this Term equally compel resolution of the cognizability question this Term.

To be eligible for collateral relief, prisoners whose sentences were enhanced under § 4B1.2(a)(2)'s residual clause not only need *Johnson* to apply retroactively, but also need their *Johnson*-based challenge to be "cognizable" in a collateral proceeding. The question of cognizability in the Guidelines context ultimately turns on whether *Johnson*'s constitutional holding applies to § 4B1.2(a)(2)'s residual clause. If so, the prisoners would have a constitutional, and thus cognizable, claim under § 2255(a). *See Hill v. United States*, 368 U.S. 424, 426-28 (1962). But if not, then not. *See Spencer v. United States*, 773 F.3d 1132 (11th Cir. 2014) (*en banc*) (holding that nonconstitutional Guideline errors are not cognizable on collateral review because they

do not amount to a miscarriage of justice). Because retroactivity and cognizability both serve as independent prerequisites to collateral relief, this Court should consider both questions together.

Moreover, all of the considerations above explaining why resolution of the retroactivity question is necessary this Term also apply to the cognizability question. If the Court affirmatively resolves the cognizability question in a subsequent Term, then those prisoners in the successive posture will be forced to file original habeas petitions in order to benefit from that ruling given the statute of limitations. And if the Court negatively resolves that question in a subsequent Term, then lower courts would needlessly be inundated with an avalanche of pro se litigation in the interim.

B. The circuits are divided on whether *Johnson* applies to the Guidelines's residual clause.

Whether *Johnson* applies to the Guidelines's residual clause has already generated a split in the circuit courts. In *United States v. Matchett*, 802 F.3d 1185, 1193-96 (11th Cir. 2015), the Eleventh Circuit rejected the government's concession that *Johnson* applied to the residual clause in § 4B1.2(a)(2), holding instead that the advisory Guidelines were not susceptible to a vagueness challenge. That ruling stands alone among the circuits.

The Tenth Circuit has rejected *Matchett* as unpersuasive and squarely held that, in light of *Johnson*, "the residual clause of § 4B1.2(a)(2) is void for vagueness." *United States v. Madrid*, 805 F.3d 1204, 1210-11 (10th Cir. 2015). The Third Circuit has done

the same. *United States v. Townsend*, ___ Fed. Appx. ___, 2015 WL 9311394, at *4 & n.14 (3d Cir. Dec. 23, 2015). In addition, the First, Second, Sixth, and Eighth Circuits have all either concluded that *Johnson* applies to the Guidelines, or vacated and remanded for resentencing in light of the government's concession that it does. *See, e.g., United States v. Soto-Rivera*, 811 F.3d 53, 58 (1st Cir. 2016); *United States v. Maldonado*, ___ Fed. Appx. ___, 2016 WL 229833 (2d Cir. 2016); *United States v. Taylor*, 803 F.3d 931, 933 (8th Cir. 2015); *United States v. Grayer*, 625 Fed. Appx. 313, 315 (6th Cir. 2015).

Although *Matchett* and the cases that stand in conflict with it were all decided on direct appeal, they bear directly on the cognizability question at issue here. If *Matchett* is left undisturbed, then hundreds if not thousands of federal prisoners in the Eleventh Circuit will be categorically barred from seeking relief based on *Johnson*, whether on direct appeal or in collateral proceedings.

In light of the circuit split, geography alone determines a prisoner's ability to seek relief under *Johnson*. For example, had Mr. *Beckles* been sentenced in the Tenth Circuit, his *Johnson* claim would be cognizable on collateral review. In the Eleventh Circuit, however, it is not. This Court's immediate intervention is necessary to ensure uniformity on this important question of law.

C. The Eleventh Circuit's anomalous decision is clearly wrong.

Further compelling review is that *Matchett* was wrongly decided. In appellate courts around the country, the government has affirmatively set forth its well-

considered national position "that *Johnson*'s constitutional holding regarding the ACCA's residual clause applies to the identically worded clause of the career offender guideline." *United States v. Madrid*, U.S. Brief, 2015 WL 4985890, *3 (10th Cir. August 2015) (No. 14-2159). After all, the two residual clauses are not only identically worded, but have always been interchangeably interpreted. *Id.* at *3-4 (citing cases). This Court itself did so in *Johnson*, relying on Guidelines cases to illustrate the vagueness of the ACCA's residual clause. *See* 135 S. Ct. at 2560 (citing Guidelines decisions in *United States v. Whitson*, 587 F.3d 1218 (11th Cir. 2010) (*per curiam*); *United States v. Williams*, 559 F.3d 1143 (10th Cir. 2009); *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013); and *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010)).

Any doubt that *Johnson*'s constitutional holding applies to the Guidelines is eliminated by *Peugh v. United States*, 133 S. Ct. 2072 (2013), which held that the retrospective application of the advisory Guidelines violated the Ex Post Facto Clause. *Id.* at 2078. The Court emphasized that the Guidelines, while advisory, nonetheless remained the "lodestone" and "anchor" of the sentencing regime, and are subject to constitutional constraints. *Id.* at 2083-87. When read together, *Johnson* and *Peugh* compel the conclusion that *Johnson* applies to the Guidelines.

In reaching the contrary conclusion, the Eleventh Circuit in *Matchett* inexplicably relied entirely on decisions from other circuits that pre-dated both *Peugh* and *Johnson*. *See Matchett*, 802 F.3d at 1194-96 (citing, *e.g.*, *United States v. Tichenor*,

683 F.3d 358 (7th Cir. 2012), *United States v. Smith*, 73 F.3d 1414 (6th Cir. 1996); and *United States v. Wivell*, 893 F.3d 156 (8th Cir. 1990)). Those decisions adopted a cramped view of the vagueness doctrine, limiting it to laws proscribing conduct. *See, e.g., Wivell*, 893 F.2d at 159-60. But *Johnson* made clear that the doctrine "appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences." 135 S. Ct. at 2557 *Matchett* also adopted those circuits' pre-*Peugh* reasoning that the Guidelines were not susceptible to vagueness challenges because they were "merely" the starting point, and that a "'sentencing judge's authority to exercise discretion distinguishes the Guidelines from criminal statutes in a significant and undeniable manner.'" *Matchett*, 802 F.3d at 1194 (quoting *Tichenor*, 683 F.3d at 365). That reasoning is fundamentally irreconcilable with *Peugh*.

Not only did *Matchett* embrace abrogated reasoning, but it did not even attempt to follow *Peugh* and *Johnson*. *Matchett* cited *Peugh* only once and stated that it "in no way inform[ed]" its analysis. *Id.* at 1195. And, as the Tenth Circuit noted when it declined to follow *Matchett*, the Eleventh Circuit mischaracterized *Johnson* as being grounded exclusively in notice concerns, thereby failing to "address the 'arbitrary enforcement by judges' with which *Johnson* was concerned." *Madrid*, 805 F.3d at 1212 n.10.

Tellingly, the very courts that issued the pre-*Peugh* decisions on which *Matchett* relied are not following those decisions. The Sixth and Eighth Circuits have granted relief post-*Johnson* to those sentenced under § 4B1.2(a)(2)'s residual clause,

notwithstanding their prior precedents holding that the Guidelines are not susceptible to a vagueness challenge. *See, e.g.*, *Taylor*, 803 F.3d at 933-34 (Colloton, J., dissenting) (criticizing majority for declining to follow circuit precedent without convening *en banc* to overrule it); *United States v. Grayer*, 625 Fed. Appx. at 315. Indeed, since *Johnson*, the Eighth Circuit has stated that "[t]he reasoning in *Wivell* that the guidelines cannot be unconstitutionally vague because they do not proscribe conduct is doubtful." *Taylor*, 803 F.3d at 933. In short, *Matchett* flouts this Court's decisions in both *Johnson* and *Peugh*, and relies on out-of-circuit precedent that is no longer followed by those circuits post-*Johnson*. It is unpersuasive on its face, and this Court should not permit it to stand.

Moreover, this split is intractable. A petition for rehearing *en banc* was filed in *Matchett* on October 13, 2015, but has languished before the Eleventh Circuit. Nonetheless, that court has treated it as a final decision, issuing at least six decisions relying on or applying *Matchett* after the rehearing petition was filed, strongly indicating that rehearing will be denied.[4]

---

[4] *United States v. Casamayor*, ___ Fed. Appx. ___, 2016 WL 722892 (11th Cir. Feb. 24, 2016); *United States v. Kirk*, ___ Fed. Appx. ___, 2016 335937 at *1 (11th Cir. Jan. 28, 2016); *United States v. Brown*, ___ Fed. Appx. ___, 2015 WL 9301410 (11th Cir. Dec. 22, 2015); *United States v. Collins*, 624 Fed. Appx. 725, 726 (11th Cir. 2015); *United States v. Dixon*, 622 Fed. Appx. 892 (11th Cir. 2015); *United States v. Walker*, ___ Fed. Appx. ___, 2015 WL 7074646, at *2-3 (11th Cir. 2015); *Denson v. United States*, 804 F.3d 1339, 1343 (11th Cir. 2015), *cert. denied*, ___ S. Ct. ___, 2016 WL 763612 (Feb. 26, 2016).

D. This petition squarely presents the cognizability issue.

Not only does this petition squarely present the retroactivity question; it also squarely presents the cognizability question. Mr. Beckles's eligibility for relief hinges on his challenge to his career offender enhancement being cognizable on collateral review.

Although the Eleventh Circuit did not mention *Matchett* in its decision on remand from this Court for reconsideration in light of *Johnson*, it nonetheless concluded that *Johnson* had no impact on Guidelines sentences, stating:

> The Supreme Court's decision in *Johnson* – in which the Supreme Court struck down, as unconstitutionally vague, the residual clause of the Armed Career Criminal Act ("ACCA") does not control this appeal. Beckles was sentenced as a career offender based not on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying Beckles's offense as a "crime of violence." *Johnson* says and decided nothing about career-offender enhancements under the Sentencing Guidelines or about the Guidelines commentary underlying Beckles's status as a career-offender.

Beckles v. United States, 616 Fed. Appx. 415, 416 (11th Cir. 2015); A-1 at 3. Thus, the court below expresly limited *Johnson* to sentences imposed under the ACCA.

Moreover, the decision below is grounded in U.S.S.G. § 4B1.2(a)(2)'s residual clause. In rejecting Mr. Beckles's claim for relief under *Johnson*, the Eleventh Circuit explicitly relied on U.S.S.G. § 4B1.2's Application Note 1 to conclude that possession of a sawed-off shotgun constitutes a "crime of violence." Specifically, the Eleventh Circuit cited its earlier decision in *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013), to state "the Guidelines commentary in U.S.S.G. § 4B1.2 is binding and, thus,

possession of a sawed-off shotgun qualifies as a 'crime of violence.'" *Beckles*, 616 Fed. Appx. at 416 (citing *Hall*, 714 F.3d at 1274).

In its pre-*Johnson Hall* decision, the Eleventh Circuit stated the question before it was "whether an offense [i.e., possession of a sawed-off shotgun] qualifies as a 'crime of violence' *under the* [*Guidelines's*] *residual clause*," and held that it did. *Hall*, 714 F.3d at 1273 (emphasis added). Thus, on remand post-*Johnson* below, when the Eleventh Circuit rejected the notion that *Johnson* is controlling, it did no more than reaffirm *Hall*. *Beckles*, 616 Fed. Appx. at 416 ("Our decision in *Hall* remains good law and continues to control this appeal."); A-1 at 3. Accordingly, the Eleventh Circuit's decision here is grounded in the residual clause in § 4B1.2(a)(2), and expressly rejects *Johnson*'s application to the Guidelines's residual clause. *See id.*

This holding, along with the continuing viability of *Matchett* in the Eleventh Circuit, precludes Mr. Beckles from obtaining § 2255 relief on his *Johnson* claim even if the Court were to independently resolve the retroactivity question in his favor. Thus, this petition presents the cognizability question, and this Court should decide that question, along with the question of *Johnson*'s retroactive application to the Guidelines's residual clause, this Term in this case.

III. Whether possession of a sawed-off shotgun remains a "crime of violence" after *Johnson* because it is listed in the commentary to U.S.S.G. § 4B1.2 is an important question warranting this Court's resolution.

Not only are the circuits divided as to whether *Johnson*'s constitutional holding applies to the Guidelines; they also are divided as to whether the "unlawful possession of a firearm described in 26 U.S.C. § 5845(a)," which is listed as a "crime of violence" in the commentary to U.S.S.G. § 4B1.2, remains a "crime of violence" after *Johnson*. This division is the latest iteration of an longstanding split in the circuits as to whether the commentary to § 4B1.2, standing alone, has its own definitional power, or whether it is only valid and authoritative if it interprets and is not inconsistent with a guideline's text. The Court's intervention is therefore required.

A. The circuits are divided as to whether, post-*Johnson*, the "unlawful possession of a firearm described in 26 U.S.C. § 5845(a)" is a "crime of violence" for purposes of § 4B1.2 because it is expressly listed as such in the commentary to that Guideline.

Application Note 1 to § 4B.12 states that "'[c]rime of violence' does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun)." U.S.S.G. § 4B1.2 cmt. n.1. The referenced statute, § 5845(a), provides various definitions of the term "firearm," and, as the parenthetical

in Application Note 1 indicates, explicitly includes sawed-off shotguns and machine guns. *See* 26 U.S.C. § 5845(a).

The Eleventh Circuit determined below post-*Johnson* that because Mr. Beckles was convicted of possession of a sawed-off shotgun, Application Note 1 to § 4B1.2 provided an independent basis for applying the career offender enhancement. *See Beckles*, 616 Fed. Appx. at 416; A-1 at 3 ("Beckles was sentenced as a career offender based not on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying Beckles's offense as a "crime of violence." *Johnson* says and decided nothing about the Guidelines commentary underlying Beckles's status as a career-offender."). The First Circuit, however, has expresaly disagreed, holding that post-*Johnson*, the commentary in Application Note 1 provides no basis for concluding that possession of a firearm falls within § 4B1.2's definition of "crime of violence." *United States v. Soto-Rivera*, 811 F.3d 53, 61 (1st Cir. 2016).

In *Soto-Rivera*, the defendant was convicted of possession of a machine gun, which, like a sawed-off shotgun, is a "firearm" described in 26 U.S.C. § 5845(a), and therefore listed as a "crime of violence" in Application Note 1 to § 4B1.2. *Id.* at 59. The First Circuit – unlike the Eleventh Circuit in *Matchett* – accepted the government's "concession that *Johnson*'s reasoning applies just as well to the Guidelines as to the ACCA" and, with the understanding that "Soto-Rivera's Career Offender status may not be predi ted upon the Guidelines's residual clause," determined that "in the absence of the residual clause, there is no textual hook in Guidelines § 4B1.2 to allow

for the conclusion that [Soto-Rivera's] possession of a firearm constituted a crime of violence." *Id.* at 59, 61.

In reaching its conclusion, the First Circuit noted that, under *Stinson v. United States*, 508 U.S. 36 (1993), "commentary 'interpret[ing] or explain[ing] a [G]uideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that [G]uideline.'" *Soto-Rivera*, 811 F.3d at 59 (quoting *Stinson*, 508 U.S. at 38) (brackets added in *Soto-Rivera*). That court therefore looked at the text § 4B1.2(a) stripped of its residual clause, and concluded that Application Note 1 was inconsistent with the guideline's remaining text. *Id.* at 60. First, the First Circuit determined, passive possession of a firearm – even a potentially dangerous one like a machine gun – did not qualify as a crime of violence under § 4B1.2(a)(1), because it did not have as an element the use, attempted use, or threatened use of physical force against the person of another. *See id.* (citing § 4B1.2(a)(1)). Next, it noted that "such possession is clearly not one of those specifically-enumerated crimes listed in U.S.S.G. § 4B1.2(a)(2)," *id.* – that is, it is not "burglary of a dwelling, arson, extortion, [or] involve[] use of explosives," § 4B1.2(a)(2).

Finally, the First Circuit rejected the argument that Application Note 1 was an independent basis for finding career offender status, noting that:

> doing so would be inconsistent with the post-*Johnson* text of the Guideline itself. By its clear language, once shorn of the residual clause, § 4B1.2(A) sets forth a limited universe of specific offenses that qualify as a "crime of violence." There is simply no mechanism or textual hook in the Guideline that allows us to import offenses not specifically listed therein into § 4B1.2(a)'s definition of "crime of violence." With no such

> path available to us, doing so would be inconsistent with the text of the Guideline. Accordingly, we reject the government's attempt to make use of § 4B.12(a)'s Application Note 1 to expand upon the list of offenses that qualify for Career Offender status.

Id.

No other circuit has considered whether possession of a firearm continues to qualify as a "crime of violence" due to Application Note 1 after *Johnson*. However, pre-*Johnson* decisions in the Fourth, Fifth, and Sixth Circuits expressly linked the question of whether possession of a sawed-off shotgun constituted a "crime of violence" to the residual clause. *See United States v. Hood*, 628 F.3d 669, 671 (4th Cir. 2010) ("Because § 4B1.2(a) does not expressly enumerate felony possession of a sawed-off shotgun, it constitutes a 'crime of violence' only if it falls under the 'residual' or 'otherwise' clause in § 4B1.2(a)(2)."); *United States v. Lipscomb*, 619 F.3d 474, 477 & n.3 (5th Cir. 2010) (holding possession of a sawed-off shotgun qualifies as a "crime of violence" only if it satisfies the residual clause); *United States v. Hawkins*, 554 F.3d 615, 618 (6th Cir. 2009) (holding Sentencing Commission's interpretation of the residual clause allowing possession of a sawed-off shotgun to qualify as a "crime of violence" was not clearly erroneous).

Therefore if, as the government concedes and the majority of circuits have concluded, *Johnson* applies to the Guidelines and excises the residual clause from § 4B1.2(a)(2), the only conclusion the Fourth, Fifth, and Sixth Circuits could reach is that possession of a sawed-off shotgun no longer qualifies as a "crime of violence" post-*Johnson*. They would therefore join the First Circuit in rejecting the Eleventh Circuit's

decision below that possession of a sawed-off shotgun remains a "crime of violence" after *Johnson*.

B. There is a longstanding division in the circuits as to whether the commentary to U.S.S.G. § 4B1.2 has freestanding definitional power, or whether offenses listed as "crimes of violence" in the commentary must instead satisfy one of the definitions in the guideline's text.

The post-*Johnson* split in the circuits as to whether possession of certain firearms constitutes a "crime of violence" under the commentary in Application Note 1 to § 4B1.2 is part of a larger, long-standing split in the circuit courts regarding the analysis to be used when relying on the Guidelines commentary to determine whether an offense is a "crime of violence."

Like the Eleventh Circuit below and in *Hall*, the Third and Seventh Circuits have found the Guidelines commentary to have freestanding definitional power; that is, the power to define "crimes of violence" regardless of whether those offenses satisfy the definitions found in the text of § 4B1.2(a)(1) or (a)(2). *See, e.g., United States v. Marrero*, 743 F.3d 389 (3d Cir. 2014) (holding Pennsylvania third-degree murder is a "crime of violence" under § 4B1.2 because "murder" is listed in the commentary and thus "enumerated" equally with those offenses listed in the text of the guideline; court never examines whether the offense satisfies either the force clause in § 4B1.2(a)(1) or the residual clause in § 4B1.2(a)(2), and distinguishes residual clause cases from

commentary cases); *United States v. Raupp*, 617 F.3d 756, 759-60 (7th Cir. 2012) (holding application notes are authoritative where they address a question uncontradicted by the text); *id.* at 762 (Wood, J., dissenting) (noting the conspiracy offense at issue does not satisfy § 4B1.2(a)(1)'s force clause and is not enumerated in § 4B1.2(a)(2) and therefore cannot be a "crime of violence" unless it satisfies the residual clause in § 4B1.2(a)(2), but majority "has concluded that it does not need to address" whether the offense qualifies under the residual clause because "it plays the trump card" of the commentary).

In sharp contrast, the First, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits, have instead concluded that offenses listed in Application Note 1 qualify as a "crime of violence" only if they satisfy one of the definitions in § 4B1.2's text. *See, e.g., Soto-Rivera*, 811 F.3d at 59-61; *United States v. Armijo*, 651 F.3d 1226, 1235 (10th Cir. 2011) (rejecting government's argument that inclusion in the commentary was sufficient to qualify manslaughter offense as a "crime of violence" where the offense failed to satisfy either the force clause in § 4B1.2(a)(1) or residual clause in § 4B1.2(a)(2)); *Hood*, 628 F.3d at 671; *Lipscomb*, 619 F.3d at 477 & n.3; *Hawkins*, 554 F.3d at 618; *United States v. Williams*, 110 F.3d 50, 52 (9th Cir. 1997) (finding kidnapping offense did not satisfy force clause in § 4B1.2(a)(1) and court "must therefore determine whether" it satisfied residual clause).

After this Court's decision in *Johnson*, and the government's concession that *Johnson* applies to the Guidelines's residual clause, this underlying split as to whether

the Guidelines commentary has freestanding definitional power is thrown into sharp relief, and requires this Court's intervention.

C. This case squarely presents whether possession of a sawed-off shotgun remains a "crime of violence" after *Johnson*.

Mr. Beckles's petition provides an ideal vehicle for the Court to determine whether possession of a sawed-off shotgun qualifies as a "crime of violence" under U.S.S.G. § 4B1.2(a)(2) after *Johnson*. First, the issue is squarely presented. Possession of a sawed-off shotgun was Mr. Beckles's instant offense of conviction. If, as the Eleventh Circuit concluded, possession of a sawed-off shotgun is a "crime of violence" under the Guidelines, his career offender enhancement remains. *See* § 4B1.1(a). If, on the other hand, this Court agrees with the First Circuit in *Soto-Rivera* that it is not a "crime of violence," Mr. Beckles was improperly sentenced as a career offender. By accepting review of Mr. Beckles's case, this Court can definitively answer whether possession of a sawed-off shotgun is a "crime of violence," and, at the same time, provide guidance to the lower courts considering other offenses listed as a "crime of violence" in the Guidelines commentary by addressing the larger split in the circuits as to whether the commentary has freestanding definitional power.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit. Should the Court issue a writ, Petitioner also prays for expedited briefing and argument in this matter this Term; or, in the alternative, that the Court expeditiously issue a *per curiam* opinion resolving the questions presented herein after the Court decides *Welch v. United States*, No. 15-6418.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: _____
Janice L. Bergmann
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
March 9, 2016

P:\Buckles, Travis Reg\70000-004\3250 Appeal FLS013-00001\Cert Petitions - 2015\2015 Petitions\WelchCertiorari.wpd

APPENDIX

APPENDIX

Eleventh Circuit Opinion On Remand Reaffirming Denial of 28 U.S.C. § 2255 Motion, *Travis Beckles v. United States*, No. 13-13569 (11th Cir. September 29, 2015) A-1

Eleventh Circuit Order Denying Petition for Rehearing *En Banc*, *Travis Beckles v. United States*, No. 13-13569 (11th Cir. February 11, 2016) ... A-2

Supreme Court Order Granting Petition for Writ of Certiorari, Vacating and Remanding for Reconsideration in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), *Travis Beckles v. United States*, 135 S. Ct. 2928 (2015) A-3

Eleventh Circuit Opinion Affirming Denial of 28 U.S.C. § 2255 Motion, *Travis Beckles v. United States*, No. 13-13569 (11th Cir. Sept. 5, 2014) .. A-4

District Court Order Granting Government's Motion for Reconsideration and Denying 28 U.S.C. § 2255 Motion, *Travis Beckles v. United States*, No. 10-cv-23517 (S.D. Fla. June 14, 2013) A-5

District Court Order Granting 28 U.S.C. § 2255 Motion, *Travis Beckles v. United States*, No. 10-cv-23517 (S.D. Fla. Mar. 4, 2013) A-6

Report of Magistrate Judge Recommending Denial of 28 U.S.C. § 2255 Motion, *Travis Beckles v. United States*, No. 10-cv-23517 (S.D. Fla. Dec. 17, 2012) A-7

Eleventh Circuit Opinion on Direct Appeal, *United States v. Travis Beckles*, 565 F.3d 832 (11th Cir. 2009) A-8

A - 1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13569
Non-Argument Calendar

D.C. Docket Nos. 1:10-cv-23517-CMA,
1:07-cr-20305-CMA-1

TRAVIS BECKLES,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(September 29, 2015)

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before WILSON, ANDERSON, and EDMONDSON, Circuit Judges.

PER CURIAM:

In this appeal, Travis Beckles challenged the district court's denial of his counseled 28 U.S.C. § 2255 motion to vacate his sentence. See Beckles v. United States, 579 F. App'x 833 (11th Cir. 2014) (unpublished). Beckles argued that he was sentenced improperly as a career offender under U.S.S.G. § 4B1.1; he contends his conviction for unlawful possession of a sawed-off shotgun was no "crime of violence." Id. We affirmed the district court's ruling, concluding that Beckles's argument was foreclosed by our decision in United States v. Hall, 714 F.3d 1270 (11th Cir. 2013). Id. The Supreme Court has now vacated our decision and remanded the case to us for additional consideration in the light of Johnson v. United States, 135 S.Ct. 2551 (2015). After additional review, we affirm.

Beckles was sentenced properly as a career offender under U.S.S.G. § 4B1.1. Beckles had at least two prior felony convictions for drug offenses. And Beckles's offense of conviction -- unlawful possession of a sawed-off shotgun -- constitutes a "crime of violence" under section 4B1.1. See U.S.S.G. § 4B1.2 cmt. n.1 (providing expressly that the unlawful possession of "a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'"); Hall, 714 F.3d at 1274 (concluding that

the Guidelines commentary in U.S.S.G. § 4B1.2 is binding and, thus, that the possession of a sawed-off shotgun qualifies as a "crime of violence").

The Supreme Court's decision in Johnson -- in which the Supreme Court struck down, as unconstitutionally vague, the residual clause of the Armed Career Criminal Act ("ACCA") -- does not control this appeal. Beckles was sentenced as a career offender based not on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying Beckles's offense as a "crime of violence." Johnson says and decided nothing about career-offender enhancements under the Sentencing Guidelines or about the Guidelines commentary underlying Beckles's status as a career-offender.

Our decision in Hall remains good law and continues to control in this appeal. See Atl. Sounding Co., Inc. v. Townsend, 496 F.3d 1282, 1284 (11th Cir. 2007) ("Under our prior panel precedent rule, a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is 'clearly on point.'"). Accordingly, we affirm.

AFFIRMED.

A - 2

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13569-BB

TRAVIS BECKLES,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON SUPREME COURT REMAND

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42

A - 3

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

June 30, 2015

Clerk
United States Court of Appeals for the Eleventh
Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: Travis Beckles
v. United States
No. 14-7390
(Your No. 13-13569)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of Johnson v. United States, 576 U. S. ___ (2015). Justice Kagan took no part in the consideration or decision of this motion and this petition.

Justice Alito concurring in the decision to grant, vacate, and remand in this case: Following the recommendation of the Solicitor General, the Court has held the petition in this and many other cases pending the decision in Johnson v. United States, 576 U. S. ____ (2015). In holding these petitions and now in vacating and remanding the decisions below in these cases, the Court has not differentiated between cases in which the petitioners would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act of 1984, 18 U. S. C. Sec. 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Court of Appeals should understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief.

The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

A - 4

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13569
Non-Argument Calendar

D.C. Docket Nos. 1:10-cv-23517-CMA,
1:07-cr-20305-CMA-1

TRAVIS BECKLES,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(September 5, 2014)

Before WILSON, ANDERSON, and EDMONDSON, Circuit Judges.

PER CURIAM:

Travis Beckles, a federal prisoner serving a 216-month sentence for possessing a sawed-off shotgun as a convicted felon, appeals the denial of his counseled 28 U.S.C. § 2255 motion to vacate his sentence. In his § 2255 motion, Beckles claimed that he was improperly sentenced as a career offender under U.S.S.G. § 4B1.1 because his conviction for possession of a sawed-off shotgun was not a "crime of violence." The district court ultimately denied the claim, citing our decision in *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013).

On appeal, Beckles acknowledges that *Hall* forecloses his claim, but contends that the case was wrongly decided. For the following reasons, we affirm.

I.

In a § 2255 proceeding, we review questions of law *de novo*. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004). We are bound by the opinion of a prior panel unless the Supreme Court or this Court sitting *en banc* overrules that opinion. *United States v. Lawson*, 686 F.3d 1317, 1319 (11th Cir. 2012).

Under § 4B1.1 of the Sentencing Guidelines, a defendant who is convicted of a felony crime of violence or a controlled substance offense, and who already had two prior such convictions, is subject to an enhanced sentence for being a

career offender. U.S.S.G. § 4B1.1(a). The term "crime of violence" includes "any offense under state law, punishable by imprisonment for a term exceeding one year, that . . . involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a).

The commentary to § 4B1.2(a) explicitly states that "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'" U.S.S.G. § 4B1.2 cmt. n. 1. Commentary in the Sentencing Guidelines that interprets a guideline "is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, 37, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598 (1993).

In *Begay v. United States*, 553 U.S. 137, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008), the Supreme Court concluded that an offense is a "violent felony" under the Armed Career Criminal Act ("ACCA") – which defines the term using language nearly identical to the definition of "crime of violence" under U.S.S.G. § 4B1.2(a) – only if it is "roughly similar, in kind as well as in degree of risk posed" to the ACCA's enumerated crimes of burglary of a dwelling, arson, extortion, or unlawful use of explosives. *See Begay*, 553 U.S. at 143, 128 S.Ct. at 1585. Applying *Begay*, in *United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010), we

concluded that a prior conviction for mere possession of a sawed-off shotgun, is not a "violent felony" under the ACCA. *McGill*, 618 F.3d at 1277.

In *Hall*, we decided that possession of an unregistered sawed-off shotgun, as defined by 26 U.S.C. § 5861(d), qualifies as a "crime of violence" under § 4B1.2(a), based on the commentary to that guideline provision. *Hall*, 714 F.3d at 1273. We explained that the commentary was controlling over *Begay* and *McGill*, because the commentary did not violate the Constitution or a federal statute, and was not inconsistent with, or a plainly erroneous reading of, the guideline text. *Id.* at 1273–74.

Here, Beckles's claim fails on the merits under *Hall*, and we are bound by that decision.

AFFIRMED.

A - 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-23517-CIV-ALTONAGA/Simonton

TRAVIS BECKLES,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE came before the Court on the United States's Motion to Reconsider Based on Intervening Eleventh Circuit Decision ("Motion") [ECF No. 39], filed May 30, 3013. The relief sought is evident from the title of the Motion, and the parties are familiar with the decision the Government seeks reconsideration of (*see* Order of March 4, 2013 ("March 4 Order") [ECF No. 34]). In response to the Motion, Movant, Travis Beckles, acknowledges that the undersigned is bound by the Eleventh Circuit's recent decision in *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013), but "posits" that the Eleventh Circuit reached the "wrong conclusion" in *Hall*. (*See* Resp. 2 [ECF No. 41]). Movant asks the Court not to reconsider its March 4 Order, ignoring the binding effect of *Hall*. This, the undersigned will not do. Accordingly, it is

ORDERED AND ADJUDGED that the Motion to Reconsider **[ECF No. 39]** is **GRANTED**. The Order of March 4, 2013 and Final Judgment [ECF No. 35] are **SET ASIDE**. Movant's Section 2255 Motion [ECF No. 1] is **DENIED**. A certificate of appealability is granted, as the many legal memoranda filed demonstrate that "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537

U.S. 322, 327 (2003) (citation omitted).

DONE AND ORDERED in Miami, Florida, this 14th day of June, 2013.

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record

A - 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-23517-CIV-ALTONAGA/Simonton

TRAVIS BECKLES,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE came before the Court on Magistrate Judge Andrea M. Simonton's Report and Recommendation on Motion to Vacate Pursuant to 28 U.S.C. § 2255 ("Report") [ECF No. 27], issued on December 17, 2012. On September 30, 2010, Movant, Travis Beckles ("Beckles" or "Movant"), by and through counsel, filed a Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 ("Motion" or "Section 2255 Motion") [ECF No. 1]. The Court referred the Motion to Magistrate Judge Stephen T. Brown on October 4, 2010. (*See* [ECF No. 5]). On January 28, 2011, the Court set aside the referral and administratively closed the case in light of the then-pending *en banc* hearing in *Gilbert v. United States*. (*See* Order dated Jan. 28, 2011 [ECF No. 10]). After the Eleventh Circuit issued its *en banc* decision, *see Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011), the case was reopened, and the Motion was referred to Magistrate Judge Simonton. (*See* Order dated June 22, 2011 [ECF No. 16]). Magistrate Judge Simonton received supplemental briefs on the Motion (*see* [ECF Nos. 19, 20]), and heard oral argument (*see* [ECF No. 26]).

The sole issue before Magistrate Judge Simonton was whether Beckles's challenge to the

determination of his sentencing guideline range is cognizable in a Section 2255 motion. (*See* Rep. 2). More specifically, the question was

> whether a defendant may obtain relief pursuant to 28 U.S.C. § 2255 where his advisory sentencing guideline range was incorrectly enhanced using the career offender guideline, he preserved the error for review on direct appeal, has timely filed his first Motion to Vacate pursuant to 28 U.S.C. § 2255, and there is a reasonable probability that he received a greater sentence than he would have received if his guideline range had been properly calculated; but the sentence imposed after giving him credit for providing substantial assistance to the government was below the unenhanced guideline range applicable to non-career offenders.

(*Id.* 3). After careful consideration, Judge Simonton recommends the Motion be denied, but that a certificate of appealability be issued. (*See id.* 36). Beckles timely filed Objections [ECF No. 28], to which the United States ("Government"), responded (*see* Resp. [ECF No. 33]). The Court has conducted a *de novo* review of the record and has carefully considered the Report, the parties' respective positions, and applicable law.

I. BACKGROUND

A jury convicted Beckles on August 2, 2007 of possession of a firearm by a convicted felon, in violation of 18 U.S.C. section 922(g). Following the trial, the Pre-Sentence Investigation Report ("PSI") prepared for the Court recommended that Beckles be sentenced as an armed career criminal pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e), which requires that a minimum sentence of 15 years (180 months) be imposed. The offense statutory maximum is a life sentence.

Pursuant to the Armed Career Criminal Act, the United States Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines") provide:

> The offense level for an armed career criminal is the greatest of:
>
> (2) the offense level from §4B1.1 (Career Offender) if applicable; or
> (3) (A) 34, . . if the firearm possessed by the defendant was of a

type described in 26 U.S.C. § 5845(a)[1]

U.S.S.G. § 4B1.4(b) (2006) (emphasis in original). Under the Career Offender provision, an offense with a statutory maximum sentence of life is assigned an offense level of 37. (*See id.* § 4B1.1). A criminal history category of VI, which was assigned to Beckles, corresponds to the following sentencing guideline ranges: 262 to 327 months for an offense level of 34; 360 months to life for an offense level of 37. Ultimately, the PSI recommended that Beckles be sentenced as a career offender[2] as "he was at least 18 years old at the time of the instant offense, the instant offense is a felony crime of violence (unlawful possession of a sawed-off shotgun), and the defendant has at least two prior felony convictions of a controlled substance offense." (PSI 6).[3]

At the October 17, 2007 sentencing hearing, the Court observed:

> [T]he Defendant has 18 arrests that resulted in convictions and/or juvenile adjudications, and I note in the presentence report 12 additional arrests that did not result in convictions, and we have a defendant, Mr. Beckles, who is 24-years-old. That's a pretty extensive criminal history.
>
> When I look at the exhibits which have been introduced today, the certified copies of the prior convictions, what stands out is that the defendant was never appropriately punished for any of his prior felony convictions.

---

[1] There is no current dispute that Beckles possessed a firearm of a type described in 26 U.S.C. section 5845(a), namely, a sawed-off shotgun.

[2] A defendant is a career offender if

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;
>
> (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
>
> (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1 (indentation added). It is evident that Beckles's crime is not a controlled substance offense. It is also undisputed that Beckles does not challenge either the first or third requirement.

[3] An electronic version of the PSI is unavailable on the Court's CM/ECF Case Management System.

> I share in [A.U.S.A.] Mr. Koukios' sentiments that the failure of the State Criminal Justice System to adequately and appropriately have addressed the severity of your crimes is not a reflection upon what occurs here. It is a sad testament that you are going to be sentenced today to a term of imprisonment far in excess of anything you have ever remotely experienced, and [your attorney,] Mr. Spivak has time and time again in this case presented arguments on your behalf as to why I should not sentence you within the Guidelines, and Mr. Koukios has responded by referring the Court back to Congress' mandate as it pertains to career offenders such as yourself, and Congress has spoken and directed the Sentencing Commission that the Guideline for career offenders should specify a sentence to a term of imprisonment at or near the maximum term authorized — the maximum — and the maximum here, of course, is life.
>
> The Sentencing Commission also established certain minimum offense levels where the weapon possessed is a sawed-off shotgun, as it was here.
>
> I am not persuaded, notwithstanding that I agree with Mr. Spivak that you were not appropriately sentenced in the State Court, to depart from the advisory Guideline range here and to sentence you outside the Guidelines.

(Sentencing Tr. dated Oct. 17, 2007, at 40:23–41:3, 41:4–8, 42:7–43:3 [ECF No. 75 in Case No. 07-20305-CR]).

Following Beckles's unsuccessful direct appeal of his original sentence,[4] on April 7, 2010, the Government filed a Motion for Reduction of Sentence Pursuant to Federal Rule of Criminal Procedure 35(b) [ECF No. 33]. On June 22, 2010, the Court held a hearing and granted the Motion. (*See* Tr. for Hr'g dated June 22, 2010, at 8:7–8 [ECF No. 18 in Case No. 07-20305-CR]). The hearing focused on the extent of Beckles's cooperation with the Government, with no specific discussion of the crime for which Beckles was imprisoned. (*See generally id. passim*). Although the Government requested only a 20 percent sentencing reduction, the Court was persuaded that a 40 percent reduction was warranted. (*See id.* 8:8–9). Beckles's prison term was thereby reduced to 216 months. (*See* Order dated June 22, 2010 [ECF No. 150 in Case No. 07-

[4] *See United States v. Beckles*, 565 F.3d 832 (11th Cir. 2009) (affirming conviction and sentence); *Beckles v. United States*, 130 S. Ct. 272 (2009) (denying petition for writ of certiorari).

20305-CR]).

Beckles now challenges his sentence, asserting that his original sentence was improperly enhanced because unlawful possession of a sawed-off shotgun is not a crime of violence, and therefore, he is not a career offender. Beckles contends had he not been deemed a career offender, the appropriate sentencing guidelines would have yielded a sentencing range of 262 to 327 months; consistent with what the Court did at his sentencing hearing the Court would have sentenced Beckles to the low-end of the guidelines range;[5] and application of the Court's subsequent 40 percent reduction would have yielded a final sentence of 180 months, the statutory minimum sentence required for unlawful possession of a firearm by a felon. The Government opposes the relief sought in the Motion solely on the ground that Beckles's challenge is not cognizable under Section 2255. (*See* Rep. 2 & n.1 (declining to *sua sponte* address argument not properly raised in the parties' briefs); *see generally* Resp. (no objection to Judge Simonton's decision to decline to address issues not discussed in the papers)).

II. LEGAL STANDARD

When a magistrate judge's "disposition" has properly been objected to, district courts must review the disposition *de novo*. FED. R. CIV. P. 72(b)(3). When no party has timely objected, however, "the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." FED. R. CIV. P. 72 advisory committee's notes (citation omitted). Although Rule 72 itself is silent on the standard of review, the Supreme Court has acknowledged Congress's intent was to only require a *de novo* review where objections have been properly filed, not when neither party objects. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985) ("It does not appear that Congress intended to require district court review of a magistrate

[5] A forty percent reduction from even the high-end of the correct guidelines would have also yielded a lesser sentence of 196 months.

[judge]'s factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings."). In any event, the "[f]ailure to object to the magistrate [judge]'s factual findings after notice precludes a later attack on these findings." *Lewis v. Smith*, 855 F.2d 736, 738 (11th Cir. 1988) (citing *Nettles v. Wainwright*, 677 F.2d 404, 410 (5th Cir. 1982)).

III. DISCUSSION

Section 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground
>
> [(1)] that the sentence was imposed in violation of the Constitution or laws of the United States, or
>
> [(2)] that the court was without jurisdiction to impose such sentence, or
>
> [(3)] that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack,
>
> may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a) (emphasis added). Beckles's sentence clearly does not exceed the maximum authorized by law, which is life imprisonment. The Court's jurisdiction is also not at issue. Thus, what remains for the Court to determine is whether Beckles's cause falls under any of the remaining statutory grounds for relief; namely, whether the sentence: (1) was imposed in violation of the Constitution; (2) was imposed in violation of the laws of the United States; or (3) is otherwise subject to collateral attack. The Court reviews each possible ground for relief in turn.

A. Whether the Sentence Violates the Constitution

Although Beckles initially asserted that the sentence was imposed in violation of his constitutional due process rights (*see* Rep. 14 (citing Reply 2 [ECF No. 9]), he did not

specifically object to Judge Simonton's conclusion that such an argument was rejected by the Eleventh Circuit in *Gilbert*, 640 F.3d 1321–22 ("Gilbert's claim that a sentencing guidelines provision was misapplied to him is not a constitutional claim. If it were, every guidelines error would be a constitutional violation. However prescient the Founders may have been in other respects, they did not think to incorporate the sentencing guidelines into the Constitution or Bill of Rights. Nor is it plausible to suggest that every error adversely affecting a defendant's sentence violates the Due Process Clause."). Accordingly, *de novo* review of this issue is not warranted.

The undersigned has reviewed the Report, the Motion, the record, and the applicable law to assure herself that no clear error appears on the face of the record. In the light of that review, the undersigned agrees with the analysis and recommendations stated in Judge Simonton's Report that relief is unavailable under this prong of Section 2255.

B. Whether the Sentence Violates the Laws of the United States

It is well established that a claim raised under Section 2255 need not be of constitutional dimension to be cognizable. *See Davis v. United States*, 417 U.S. 333, 342–46 (1974); *id.* at 344 ("[T]here can be no doubt that the grounds for relief under § 2255 are equivalent to those encompassed by § 2254, the general federal habeas statute, under which relief is available on the ground that '(a person) is in custody in violation of the Constitution or laws or treaties of the United States.'" (alterations in original)). Nevertheless, not "every asserted error of law can be raised on a § 2255 motion." *Id.* at 346. Indeed, "'collateral relief is not available when all that is shown is a failure to comply with the formal requirements' of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error." *Id.* (quoting *Hill v. United States*, 368 U.S. 424, 429 (1962)). Rather, for a movant to obtain relief,

the claimed error of law should be "'a fundamental defect which inherently results in a complete miscarriage of justice,' and present[] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Id.* (quoting *Hill*, 368 U.S. at 428); *see also United States v. Addonizio*, 442 U.S. 178, 185 (1979).

What is encompassed by the term "laws of the United States" is disputed by the parties. As Justice Rehnquist once observed, "the term's longevity [since the Habeas Corpus Act of 1867] has not brought with it a corresponding judicial elucidation. Like many other issues in the field of habeas corpus, the question seems to have been left for decision on a case-by-case basis." *Davis*, 417 U.S. at 359 (Rehnquist, J., dissenting). In this case, the Report's careful review of Eleventh Circuit case law shows that the appellate court has not reached the cognizability issue presented here. *See, e.g., Gilbert*, 640 F.3d at 1306 (finding "no reason to decide" whether a guidelines misapplication claim may be brought in a collateral attack); *McKay v. United States*, 657 F.3d 1190, 1195 (11th Cir. 2011) ("Because we hold that McKay's sentencing claim is procedurally defaulted , we leave for another day the question of whether this type of claim is cognizable under § 2255 in the first instance."). Judge Simonton ultimately concludes that "sentencing guidelines are not 'laws' within the meaning of § 2255" (Rep. 15), and that therefore Beckles's sentence was not imposed in "violation of the laws of the United States." Although the Court recognizes that "errors in the implementation of the Sentencing Guidelines are generally not cognizable in a collateral attack," *Buggs v. United States*, 153 F.3d 439, 443 (7th Cir. 1998) (citations omitted), for the following reasons, the Court departs from Judge Simonton's recommendation.

a. Identifying the Alleged Error

As a threshold matter, the law that Beckles's sentence is alleged to violate must be

specifically identified. *See, e.g.*, *Davis*, 417 U.S. at 359–361 (teasing out the "law of the United States" at issue) (Rehnquist, J., dissenting). Beckles does not argue that the violated "law" is contained in the text of or commentary to a particular sentencing guideline. In other words, he does not contend that his offense level was incorrectly calculated because the text of the guidelines manual was not followed accurately according to the law as it was understood at the time. Indeed, the applicable guidelines manual specifically states: "Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun .) is a 'crime of violence,'" U.S.S.G. § 4B1.2, at 373 (defining terms used in U.S.S.G. § 4B1.1 and including "application notes" in commentary), and the PSI reflects the application of this note. (*See* PSI 6). Rather, throughout Beckles's legal memoranda, he reiterates the violated "law" is that established by *Begay v. United States*, 553 U.S. 137 (2008), *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008), and *United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010) — which counsel that possession of a sawed-off shotgun is not a "crime of violence" within the meaning of U.S.S.G. section 4B1.1.[6]

The alleged error identified here is similar to the law that was violated in *Davis*, 417 U.S. 333. In that case, the petitioner, Joseph Anthony Davis ("Davis"), after having been ordered to report for a pre-induction physical examination by his draft board, failed to appear for the physical. After multiple attempts to communicate with Davis to schedule another date for the physical, the draft board declared him a "delinquent" pursuant to 32 C.F.R. section 1642.4(a)

[6] The Report summarizes the law of those cases as follows: "*Begay* narrowed the definition of what constituted a violent felony under the Armed Career Criminal Act ["ACCA"];" *Archer* held that the "definition of 'violent felony' for purposes of the Armed Career Criminal Act is 'virtually identical' to the definition of a crime of violence for purposes of the career offender guideline enhancement, and that the crime of carrying a concealed firearm is not a crime of violence" (Rep. 5–6); and the Eleventh Circuit concluded in *McGill* that possessing a "short-barreled shotgun was not a violent felony under the ACCA." *McGill*, 618 F.3d 1273, 1279 (11th Cir. 2010).

(1967). Davis was then ordered to report for induction into the Armed Forces despite not having completed a physical, as the draft board was permitted to do under 32 C.F.R. section 1631.7. Having failed to report for the induction hearing, Davis was prosecuted and convicted under 50 U.S.C. App. § 462(a). Following an unsuccessful appeal of his conviction on the merits, Davis filed a Section 2255 motion, asserting that an intervening change in the law rendered his confinement in violation of the laws of the United States. *See Davis*, 417 U.S. at 335–37, 340, 342–43. The Supreme Court agreed and held that relief under Section 2255 was available to Davis by reason of an intervening change in the law.

Specifically, the law at issue in *Davis* was the Ninth Circuit Court of Appeals panel decision in *United States v. Fox*, 454 F.2d 593 (9th Cir. 1971), which was published after Davis's initial sentencing. *See Davis*, 417 U.S. at 340–41; *id.* at 360 (Rehnquist, J., dissenting) (closely analyzing the majority's opinion). The *Fox* court had addressed nearly identical circumstances as those presented in *Davis*, and relied upon the principles outlined by the Supreme Court in *Gutknecht v. United States*, 396 U.S. 295 (1970), to conclude that an accelerated induction hearing brought about by a declaration of delinquency was, as a matter of law, punitive, and therefore unlawful. The *Davis* Court remanded the case because according to *Fox*, the act for which Davis was convicted and punished — failure to report for an accelerated induction — was no longer criminal because the induction hearing he failed to attend was unlawful.

Similarly, here, the judicial lawmaking of concern consists of Eleventh Circuit panel decisions, *Archer* and *McGill*, both of which issued after Beckles was first sentenced. These cases were premised on the Supreme Court decision in *Begay* — which was also issued after Beckles's initial sentencing — clarifying the definition of "violent felony" as the term is used in

the Armed Career Criminal Act. Directly following from these Eleventh Circuit decisions is the legal conclusion that possession of a sawed-off shotgun is not a "crime of violence" within the meaning of U.S.S.G. section 4B1.1. The Government does not contest this issue in its briefs. Just as the violated "law" at issue in *Davis* was *Fox* and *Gutknecht* (and not the federal regulation under which Davis's accelerated induction hearing was held), the violated "law" here is that expressed in *Begay*, *Archer*, and *McGill* (and not the Sentencing Guidelines that define "crime of violence").

Thus, the Court's inquiry does not hinge on whether the advisory Sentencing Guidelines are or are not "laws of the United States," and whether the misapplication of those Guidelines presents a cognizable Section 2255 claim. Instead, the issue is whether the violation of the principles of *Begay*, *Archer*, and *McGill*, laws unto themselves, presents a cognizable Section 2255 claim.

b. Whether the Error Was a Fundamental Defect Which Inherently Results in a Complete Miscarriage of Justice[7]

To determine whether a violation of the law of *Begay/Archer/McGill* is cognizable on a Section 2255 motion, the error must be "a fundamental defect which *inherently* results in a complete miscarriage of justice." *Davis*, 417 U.S. at 346 (quoting *Hill*, 368 U.S. at 428)

[7] The briefing and Report consistently refer to a "*fundamental* miscarriage of justice" standard. However, the analysis required in this case rests on a determination of whether a "*complete* miscarriage of justice" followed from a fundamental defect. *Davis*, 417 U.S. at 346 (quoting *Hill*, 368 U.S. at 428). The Court has no comment on whether the two standards are equivalent.

In any event, case law addressing whether a "fundamental miscarriage of justice" (a term often used interchangeably with "actual innocence" in such cases) exists to overcome a petitioner's procedural default of his claims, is unenlightening. No law has been presented to the Court to support the proposition that *Hill*'s "complete miscarriage of justice" standard is only met when a petitioner's actions for which he was convicted are later deemed lawful. Indeed, in *Addonizio*, 442 U.S. at 187, the grounds raised by petitioner to vacate his sentence rested on a subsequent change to parole policies, wholly unrelated to his underlying guilt. Yet, the Supreme Court did not reject the petitioner's claims for failing to show that he was not innocent; rather, the Court went through a lengthy, careful analysis of why his claim did not warrant Section 2255 relief. *See id.* 187–190.

(emphasis added). Such an error is one that "renders the entire proceeding irregular or invalid." *Addonizio*, 442 U.S. at 187. Typically, errors of this "fundamental" nature do not include "procedural" errors. *See, e.g.*, *Narvaez v. United States*, 674 F.3d 621, 627–28 n.11 (7th Cir. 2011) (examining five cases where the Supreme Court "addressed the issue of whether a non-constitutional, non-jurisdictional error is a miscarriage of justice" and observing that the Court found no miscarriage of justice in four cases that involved "errors of a procedural nature," but did find a miscarriage of justice in the sole case involving a "substantive error" (citations omitted)). After carefully reviewing applicable case law, Judge Simonton recommends that because Beckles's current sentence of 216 months "does not exceed the statutory maximum [of a life sentence]" and "could be reimposed even without the career offender enhancement," Beckles's sentence does not "constitute[] a miscarriage of justice." (Rep. 24). For the following reasons, the Court disagrees with this conclusion.

As a threshold matter, the Court clarifies that the violation of the law of *Begay/Archer/McGill* occurred at the initial sentencing hearing when the Court premised its initial sentence on Beckles's career offender status due to his possession of a sawed-off shotgun. (*See* Sentencing Tr. dated Oct. 17, 2007, at 42:17–24 ("Congress has spoken and directed the Sentencing Commission that the Guideline for career offenders should specify a sentence to a term of imprisonment at or near the maximum term authorized . . The Sentencing Commission also established certain minimum offense levels where the weapon possessed is a sawed-off shotgun, as it was here.")). This error *inherently* resulted in the application of an incorrect Guidelines range of 360 months to life (*see* Sentencing Tr. dated Oct. 17, 2007, at 40: 13–19), as opposed to a sentencing range of 262 to 327 months. Other unrelated circumstances that may have fortuitously ameliorated some of the consequences flowing from the error — such as

Beckles's substantial cooperation with the Government on an unrelated matter, and the Government's motion for a sentence reduction on that basis — do not affect the Court's present evaluation of the error and its inherent consequences. Indeed, the Government concedes, and the Court agrees, that regardless of Beckles's initial sentence, his cooperation with the Government in an unrelated murder case would have yielded the same 40% reduction in sentence. In short, the critical question is not whether Beckles's modified 216-month sentence is a complete miscarriage of justice, but whether his initial 360-month sentence is a complete miscarriage of justice.

Beckles was clearly prejudiced by the error as it resulted in a sentence disparity of 33 to 98 months. Nevertheless, the Government argues, however, that because the Sentencing Guidelines are now advisory as opposed to mandatory, the disparity is not "illegal" or "invalid"; rather, because the Court maintains discretion to sentence individuals within statutory limits, Beckles's initial sentence, even if issued under misguidance, remains lawful and is therefore not a "complete miscarriage of justice." The Report finds merit in this argument. (*See* Rep. 20–21 (citing *Gonzalez v. United States*, Nos. 8:11-cr-134-T-17EAJ, 8:11-cv-1474-T-17EAJ, 2012 WL 279451 (M.D. Fla. Jan. 31, 2012); *Harris v. United States*, No. 8:11-CV-T-30TBM, 2011 WL 5834749 (M.D. Fla. Nov. 21, 2011)). For the following reasons, the Court disagrees.

Although the Court enjoys broad discretion in sentencing determinations, that discretion is not unfettered. *See Mistretta v. United States*, 488 U.S. 361, 363–370 (1989) (laying out the history of discretionary sentencing in the federal criminal justice system through the 1984 Sentencing Reform Act ("SRA"), 18 U.S.C. § 3551 *et seq.*, which implemented mandatory sentencing guidelines); *United States v. Booker*, 543 U.S. 220, 259 (2005) (severing two provisions of the SRA, including "the provision that requires sentencing courts to impose a

sentence within the applicable Guidelines range []in the absence of circumstances that justify a departure[]"). The Court must still comply with the SRA, which

> requires judges to *consider the Guidelines sentencing range established for the applicable category of offense committed by the applicable category of defendant*, § 3553(a)(4)(A), the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims, §§ 3553(a)(1), (3), (5)-(7) (2000 ed. and Supp. IV). And the Act nonetheless requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care. § 3553(a)(2) (2000 ed. and Supp. IV).

Id. at 259-260 (emphasis added; internal quotation marks omitted). Sentences can be appealed and reviewed by appellate courts on "reasonableness" grounds. *Id.* at 261. Thus, although "the Guidelines are no longer mandatory, neither are they without force." *United States v. Wetherald*, 636 F.3d 1315, 1321 (11th Cir. 2011). Not only is consideration of the Guidelines required by statute, "[t]he simple reality of sentencing is that a 'sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines.'" *Id.* (quoting *Rita v. United States*, 551 U.S. 338, 351 (2007)). "This starting point serves to cabin the potential sentence that may be imposed." *Id.*

Because the Guidelines are "central to the sentencing process," *id.* at 1322, and have a binding effect, the Eleventh Circuit has held, for example, that the *Ex Post Facto* Clause is violated when a district judge applies the Sentencing Guidelines range in effect on the date of sentencing that is greater than the Guidelines range in effect on the date of the offense, if the decision results in a substantial risk of harsher punishment. *Id.* at 1322–23. *Wetherald* illustrates that although "ordinary" errors in the application of the Guidelines may not result in a complete miscarriage of justice, *Gonzalez*, 2012 WL 279451, at *5, certain application errors do.

That the error illustrated in *Wetherald* is one of constitutional dimension does not

preclude a finding that certain non-constitutional Guideline application errors can result in a miscarriage of justice. Indeed, *Hill*'s complete miscarriage of justice standard applies to non-constitutional errors; it would be circuitous and illogical to require a Guidelines application error to amount to a constitutional violation before the Court can deem the error results in a complete miscarriage of justice.

The error here — a violation of the law established in *Begay/Archer/McGill* — is no "ordinary" Guidelines application error. "*Begay* announced a new substantive rule of law." *Kendrick v. United States*, Case Nos. 5:08–cv–447–Oc–10GRJ, 5:03–cr–63–Oc–10GRJ2009, 2009 WL 2958976, at *2 (M.D. Fla. Sept. 15, 2009). Additionally, "*Archer* represents a clear and dramatic break from prior precedent involving an important substantive issue as distinguished from a procedural question or clarification of original intent." *Id.* The Court agrees with these opinions of Judge Terrell Hodges — what constitutes "crimes of violence" was substantively changed by *Begay*, *Archer*, and now, *McGill*. Significantly, the application note of the Guidelines, "[u]nlawfully possessing a [sawed-off shotgun] is a 'crime of violence,'" U.S.S.G. § 4B1.2 (application notes), is at odds with the legal principle set forth by *Begay/Archer/McGill*. The cases relied upon in the Report, *Harris*, 2011 WL 5834749, and *Gonzalez*, 2012 WL 279451, are less persuasive on this issue.[8]

---

[8] The *Harris* court relied on *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004), and *Burke v. United States*, 152 F.3d 1329, 1331–32 (11th Cir. 1998), to support its conclusion that a challenge to a trial court's application of the Sentencing Guidelines was "a non-constitutional issue that provides no basis for collateral relief." *Harris*, 2011 WL 5834749, at *3. The citation to *Lynn*, however, merely explains that a Section 2255 motion "may not be a surrogate for a direct appeal," *Lynn*, 152 F.3d at 1232, which is not at issue here; and the issue presented in *Burke* — whether a post-conviction clarifying amendment to the Guidelines presented a cognizable non-constitutional issue — is distinguishable from the question raised by Beckles. As to *Gonzalez*, the court there reasoned in part that the Sentencing Guidelines application error at issue was "ordinary" because such an error could not be "inconsistent with the rudimentary demands of fair procedure" in a system of "unbounded sentencing discretion." *Gonzalez*, 2012 WL 279451, at *5 (citation omitted). For the reasons previously stated, *see supra* 13–14, the Court does not have "unbounded sentencing discretion" and therefore finds *Gonzalez* inapplicable.

The identified defect undermines the validity of Beckles's sentencing proceedings. At the sentencing hearing, the Court commented that it was a "sad testament" that Beckles was going to be sentenced to a term of imprisonment far in excess of anything he had previously experienced (Sentencing Tr. dated Oct. 17, 2007, at 42:10–12); because he received such lenient sentences for his prior state court convictions, the gravity of Beckles's state crimes was not impressed upon him through his punishments. The Court ultimately sentenced Beckles to the low-end of the Guidelines. (*See id.* 43:10–12). In declining to downward depart from the Guidelines, the undersigned emphasized that "[t]he Sentencing Commission established certain minimum offense levels where the weapon possessed is a sawed-off shotgun," a reference to the application note of U.S.S.G. section 4B1.2 and the PSI. (*See* PSI 6). The Court continued: "I am not persuaded, notwithstanding that I agree with [Beckles's counsel] that [Beckles was] not appropriately sentenced in the State Court, to depart from the advisory Guideline range here " (Sentencing Tr. dated Oct. 17, 2007, at 42:25–43:2). In sum, the record reflects (and is consistent with the undersigned's recollection) that but for the minimum offense levels assigned by the Sentencing Commission, the Court *would not have* imprisoned Beckles to 360 months, a term substantially greater than a sentence within a corrected range of 262 to 327 months. Thus, although the imposed 360-month sentence does not exceed the statutory maximum, such a sentence could only be re-imposed under the SRA if the Court had a separate reason that could justify departing upward from the corrected range. No such reasoning was expressed at the Sentencing Hearing — quite the contrary. As such, on this record, a 360-month sentence is invalid without the career offender enhancement because it involves a "clear error of judgment" by this sentencing court in weighing the Section 3553[9] factors. *See Wetherald*, 636 F.3d at 1322.

Beckles's case contrasts sharply with the circumstances in *Ayuso v. United States*, 361 F.

[9] 18 U.S.C. § 3553.

App'x 988 (11th Cir. 2010), where the court found the district court's proceedings lacked any fundamental defect. There, the petitioner argued that he was improperly assessed an additional one criminal history point because after sentencing he successfully moved the state court to vacate a prior petty larceny conviction (which supported the added criminal history point in the petitioner's sentencing calculations) in place of a *nolo contendere* plea. *See id.* at 989–90. At the time of the petitioner's sentencing, the district court correctly calculated the petitioner's criminal history points based on a then-accurate criminal history record. Moreover, petitioner's argument was meritless as a *nolo contendere* plea would not have altered the number of criminal history points assigned to him. *See id.* at 991. Thus, the petitioner failed to demonstrate both any defect in the district court's sentencing proceedings and any resultant prejudice.

The situation presented by Beckles is most similar to the circumstances presented in *Kendrick*. There, the petitioner, Kendrick, was convicted of possessing cocaine base or crack cocaine with intent to distribute it. At sentencing, he was classified as a "career offender" because of prior convictions that the court treated as felony "crimes of violence," one of which was a conviction for carrying a concealed firearm. The "career offender" classification resulted "in a substantial enhancement of [the petitioner's] Guidelines sentence" from 16 criminal history points to an offense level of 29. *Kendrick*, 2009 WL 2958976, at *1. The court found that because a "clear and dramatic break" from a "substantive rule of law" no longer rendered carrying a concealed firearm a crime of violence, Kendrick was incorrectly classified as a "career offender" and was entitled to resentencing. *Id.* at *2.

Here, Beckles's crime of unlawfully possessing a sawed-off shotgun does not suffice as a "crime of violence." Just as in *Kendrick*, one of the three "crimes of violence" necessary to sentence Beckles as a "career offender" is lacking. *See* U.S.S.G. § 4B1.1. That the crime at

issue in Beckles is the instant offense, as opposed to an underlying offense, is a distinction without a difference, as the Guidelines require that both the instant offense as well as a minimum of two underlying offenses be either crimes of violence or controlled substance offenses.

The Court makes clear that the circumstances presented here, on this record, are "exceptional," as the Court specifically remarked at Beckles's sentencing hearing that the sentence imposed was due to his career offender status — which was designated in contravention of *Begay/Archer/McGill*. Thus, the subsequent change in the law, although it may not have rendered Beckles's sentence "unlawful,"[10] has rendered his sentencing proceedings "irregular and invalid" given the available record. *Addonizio*, 442 U.S. at 186. As such, the "need for the remedy afforded [under Section 2255] is apparent." *Hill*, 368 U.S. 424, at 428. For these reasons, the Court finds Beckles's challenge to his sentence is cognizable under Section 2255.

IV. CONCLUSION

Accordingly, it is

ORDERED AND ADJUDGED that the Report of Magistrate Judge **[ECF No. 21]** is **NOT ADOPTED**. The Motion **[ECF No. 1]** is **GRANTED**. A new sentencing hearing will be scheduled under separate Order in Beckles's criminal case after the time for filing an appeal here has expired, or an appeal is concluded. Judgment in favor of Movant, Travis Beckles, and against Respondent, the United States of America, shall be set forth on a separate document entered in the civil docket. *See* FED. R. CIV. P. 58, 79(a).

---

[10] The Court notes that its decision is not at odds with *Sun Bear v. United States*, 644 F.3d 700 (8th Cir. 2011) (*"Sun Bear II"*). In *Sun Bear v. United States*, 611 F.3d 925, 929 (8th Cir. 2010) (*"Sun Bear I"*), the court granted Section 2255 relief because "a post-conviction change in the law render[ed] unlawful the district court's sentencing determination." *Id.* at 930. That decision was overturned when the court reheard the case *en banc*. Specifically, the *en banc* panel held: "Sun Bear's 360-month sentence is not unlawful. An unlawful or illegal sentence is one imposed without, or in excess of, statutory authority." *Sun Bear II*, 644 F.3d at 705.

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of March, 2013.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Andrea M. Simonton
counsel of record

A - 7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-23517-CIV-ALTONAGA/SIMONTON

TRAVIS BECKLES,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATION ON MOTION TO VACATE PURSUANT TO 28 U.S.C. § 2255

Movant Travis Beckles has filed a Motion to Vacate pursuant to 28 U.S.C. § 2255 attacking his federal sentence in Case No. 07-20305-CR-ALTONAGA (S.D. Fla. 2009) (DE # 1). The Government timely filed a Response to the Motion (DE # 8) and the Movant filed a Reply (DE # 9). The Motion was referred to the undersigned Magistrate Judge by the Honorable Cecilia M. Altonaga, United States District Judge (DE # 16). The Parties have also submitted Supplemental Briefs on the Motion (DE ## 19, 20), and an oral argument was held before the undersigned. For the following reasons, the undersigned recommends that the Motion to Vacate be DENIED.

I. INTRODUCTION

The Movant in the case at bar challenges the sentence he received following his conviction for being a felon in possession of a firearm. The basis for his challenge is that he was incorrectly classified as a career offender under the Sentencing Guidelines. The crux of the Movant's argument is that in determining career offender status under U.S.S.G. § 4B1.1, the Court improperly considered possession of a sawed-off shotgun to

be a crime of violence, contrary to the holdings in *Begay v. United States*, 533 U.S. 137 (2008); *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008); and *United States v. McGill*, 618 F. 3d 1273 (11th Cir. 2010), which were decided after the imposition of his sentence. The Government opposes relief in this case solely on the grounds that a challenge to the determination of a sentencing guideline range is not cognizable in a Motion brought pursuant to 28 U.S.C. § 2255.[1]

---

[1] Due to Government's singular challenge to the Movant's Motion based upon cognizability, the undersigned does not address defenses and/or issues that might normally be presented to the Court during the briefing of a § 2255 Motion.

Specifically, in its initial response to the § 2255 Motion, the Government conceded that the issue in this case was raised on direct appeal and thus did not argue that the Movant had procedurally defaulted his claim. However, in a supplemental response and at oral argument, the Government suggested that the Court could *sua sponte* find a procedural default since the issue was not presented to the trial court and the Court of Appeals addressed the issue under a plain error standard of review. However, as discussed *infra* the undersigned declines the Defendant's request to *sua sponte* entertain this issue.

The Government also has not challenged the retroactive application of *Begay*. Thus, this Report and Recommendation does not discuss the retroactive application of *Begay* in the context of this case. *See Gilbert* v. *United States*, 609 F.3d 1159, 1165 (11th Cir. 2010) (accepting Government's concession of retroactivity of *Begay* and *Archer*) (vacated on other grounds, 640 F.3d 193 (11th Cir. 2011)(en banc)).

Moreover, the Government in opposition to the Motion did not contend that the career offender guideline was properly applied. However, at oral argument, the Government, for the first time, asserted that if Mr. Beckles were granted relief pursuant to § 2255, the Government intended to argue at the resentencing that Mr. Beckles still qualified as a career offender under the federal sentencing guidelines. Specifically, the Government stated its position that, although pursuant to the holdings in *Begay*, *Archer* and *McGill*, the offense of being a felon in possession of a firearm did not qualify as a crime of violence under the Armed Career Criminal Act ("ACCA"), Sentencing Guideline Application Note 1 to U.S.S.G. § 4B1.2 expressly lists possession of a sawed-off shotgun as a crime of violence, and this Guideline provision controls the instant case. According to the Government, Mr. Beckles, therefore, was properly treated by the sentencing court as a career offender. Even at oral argument, however, the Government did not assert this position as a basis for denying the Motion to Vacate, relying instead on its cognizability argument. The Government first mentioned this position in response to the Court's question regarding whether it conceded that, if Mr. Beckles' claim was

As discussed in more detail below, the Eleventh Circuit Court of Appeals has never directly addressed the cognizability under § 2255 of challenges to the applicability of the career offender guideline. In cases where the issue has been presented, the Court has relied instead upon alternative bases for denying relief, although the language used by the Court foreshadows denial of relief under the circumstances presented in the case at bar. Thus, based upon the case law and the arguments properly raised by the Parties, the issue before the Court is a narrow one–whether a defendant may obtain relief pursuant to 28 U.S.C. § 2255 where his advisory sentencing guideline range was incorrectly enhanced using the career offender guideline, he preserved the error for review on direct appeal, has timely filed his first Motion to Vacate pursuant to 28 U.S.C. § 2255, and there is a reasonable probability that he received a greater sentence than he would have received if his guideline range had been properly calculated; but the sentence imposed after giving him credit for providing substantial assistance to the government was below the unenhanced guideline range applicable to non-career offenders. After a thorough review of the facts of this case, the undersigned concludes that this determination is a close call, but based upon the rationale of the Eleventh

---

cognizable, there is a reasonable probability that he would receive a lower sentence. The undersigned therefore does not address that issue herein.

The Government conceded at oral argument that there is a reasonable probability that if Mr. Beckles is re-sentenced without the application of the career offender enhancement, he would receive a lesser sentence. This concession is based upon the fact that when the sentence originally imposed upon Mr. Beckles was reduced based upon his substantial assistance to the Government, the Court imposed a 40% reduction to Mr. Beckles' sentence. Thus, the Government conceded that there is a reasonable probability that the Court would impose the same percentage reduction to a newly calculated guideline range, and this would result in a lesser sentence. The undersigned therefore accepts that assumption as true for purposes of this Report and Recommendation.

Circuit Court of Appeals in various analogous cases discussed below, the undersigned is constrained to conclude that Mr. Beckles' claim is not cognizable under § 2255 since he cannot establish the miscarriage of justice that is required to obtain relief from a non-constitutional error.

II. BACKGROUND

The facts of this case are relatively straightforward. On April 24, 2007, Movant Travis Beckles was charged in a one-count indictment with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g) (Cr. DE # 6).[2] On August 2, 2007, the jury convicted Mr. Beckles of this offense (Cr. DE ## 41, 42). A Pre-sentence Investigation Report (PSI) was prepared which recommended, *inter alia*, that Mr. Beckles be sentenced as a career offender pursuant to Sections 4B1.1 and 4B1.4 of the United States Sentencing Guidelines ("U.S.S.G." or "sentencing guidelines") since "[Mr. Beckles] was at least 18 years old at the time of the instant offense, the instant offense was a felony crime of violence, and because [he] has at least two prior felony convictions of a controlled substance offense" (DE # 1 at 2, quoting PSI ¶ 18).[3] The PSI also recommended that Mr. Beckles be sentenced as an armed career criminal pursuant

---

[2] References to the documents contained in the Criminal Docket in the Report and Recommendation are designated as (Cr. DE # _____).

[3] The United States Federal Sentencing Guidelines § 4B1.1. entitled "Career Offender" provides,

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

to the Armed Career Criminal Act, 18 U.S.C. § 924(e) due to his three prior convictions for controlled substance offenses (DE # 1 at 2).[4]

Based upon the enhancements, the PSI calculated Mr. Beckles' adjusted offense level at 37 and calculated Mr. Beckles' criminal history category at a level VI pursuant to U.S.S.G. § 4B1.1(b) (DE # 1 at 2, citing PSI ¶ 41). Based on those calculations, therefore, Mr. Beckles' sentencing guideline range was 360 months to life (DE # 1 at 2, citing PSI ¶ 79). Based upon the applicability of the career offender guideline, Mr. Beckles was sentenced to 360 months of imprisonment (Cr. DE # 69 at 2).

It is not disputed that absent the career offender enhancement, Mr. Beckles' adjusted offense level would have been 34 and his criminal history category would have been level VI. 26 U.S.C. § 5845(a); U.S.S.G. §§ 4B1.4(b)(3)(A), 4B1.4(c)(2). In addition, without the career offender enhancement, Mr. Beckles' guideline sentencing range would have been between 262 and 327 months. U.S.S.G. § 5A. (DE # 1 at 10).

Mr. Beckles timely appealed his sentence, arguing, among other things, that because his conviction for being a felon in possession of a firearm was not a crime of violence, he was wrongfully sentenced as a career offender. While Mr. Beckles' case was on appeal, and after briefing was completed, the United States Supreme Court decided *Begay v. United States*, 533 U.S. 137 (2008), which narrowed the definition of what constituted a violent felony under the Armed Career Criminal Act; and, the Eleventh Circuit decided *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008), which held that the definition of "violent felony" for purposes of the Armed Career Criminal Act is

---

[4] The "Armed Career Criminal Act" (ACCA), 18 U.S.C. § 924 (e)(1) provides for a minimum fifteen-year sentence for persons convicted of violating 18 U.S.C. § 922(g), which makes it a crime to be a felon in possession of a firearm, if that person has three previous convictions for a violent felony or a serious drug offense, or both.

"virtually identical" to the definition of a crime of violence for purposes of the career offender guideline enhancement, and that the crime of carrying a concealed firearm is not a crime of violence.

The Eleventh Circuit affirmed Mr. Beckles' conviction and sentence, holding that possession of a sawed-off shotgun was a crime of violence within the meaning of U.S.S.G. § 4B1.1 (Cr. DE # 121). The opinion of the Court did not mention either *Begay* or *Archer*, although it was filed on April 17, 2009, after those cases had been decided.[5] Mr. Beckles petitioned the Supreme Court for a writ of certiorari, which was denied on October 5, 2009. *Beckles v. United States*, 130 S.Ct. 272 (Cr. DE # 132).

On April 7, 2010, the government filed a motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure (Cr. DE # 133 at 1-2), which was granted. Although the Government sought a reduction of only 20%, the Court reduced Mr. Beckles' sentence by 40 percent, to 216 months' imprisonment instead of the 360 months that he initially received (DE # 18; Cr. DE # 150).

On September 30, 2010, the Movant timely filed the instant Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 (DE # 1).

The Government filed a response to the Motion to Vacate (DE # 8), and the Movant filed a Reply (DE # 9). The action was stayed however, pending the outcome of the Eleventh Circuit's en banc rehearing in the matter of *Gilbert v. United States*, 625 F.3d 716 (11th Cir. 2010), a case which addressed, among other things, whether a defendant

---

[5] It appears that those cases were brought to the Court's attention through notices of supplemental authority, but the Government has not argued that relief in this case is precluded on the grounds that § 2255 may not be used to relitigate matters decided on direct appeal. *Davis v. United States*, 417 U.S. 333, 346-47 (1974). (DE # 1 at 3).

who had been sentenced as a career offender pursuant to the United States Sentencing Guidelines, was entitled to § 2255 relief, after one of the convictions which was relied upon for the career offender enhancement was later determined not to be a "crime of violence" (DE # 10). After the Eleventh Circuit issued its en banc opinion in *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011), the matter was referred to the undersigned, and the Parties were directed to file supplemental briefs in light of the *Gilbert* en banc opinion (DE # 17).[5] The Movant filed his Supplemental Brief (DE # 17), the Government responded (DE # 20), and the Movant filed a Reply (DE # 24).

On March 9, 2012, the undersigned held oral argument on the Motion to Vacate (DE # 26).

III. THE POSITIONS OF THE PARTIES

In the Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255, Mr. Beckles contends that he is entitled to have his sentence vacated because the crime for which he was convicted and sentenced, possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1), is no longer considered a crime of violence for purposes of applying a career offender enhancement pursuant to §§ 4B1.1 and 4B1.2 of the United States Sentencing Guidelines (DE # 1). As such, the Movant contends that he should have been sentenced under the guidelines only as an armed career criminal with a total

---

[5] Specifically, the undersigned directed the Parties to file supplemental briefs to address the following: a) The effect of the Eleventh Circuit's decision in *Gilbert* on the action at bar, including the effect, if any, of the Petition for Certiorari then pending before the Supreme Court; and, b) Whether a sentence imposing less than the statutory maximum, but based upon an incorrect calculation of the sentencing guidelines, may constitute a miscarriage of justice which is cognizable on a Motion to Vacate under 28 U.S.C. § 2255; and the effect on this determination if the sentence ultimately imposed as a result of a reduction is within the "correct" sentencing guideline range; as well as, whether this result is changed if the sentence is imposed under "advisory" rather than "mandatory" guidelines. (DE # 17).

offense level of 34 and a criminal history category of VI, which carries a guideline sentencing range of 262-327 months (DE # 1 at 10). The Movant contends that because he was improperly deemed a career offender, the sentencing Court misapplied the career offender enhancement and incorrectly calculated the total offense level of 37 and a criminal history of VI, for a guideline range of 360 months to life imprisonment, and sentenced him to 360 months. The Court later reduced his sentence by 40% to 216 months, based upon his substantial assistance to the Government. The Movant contends that if he had been sentenced under the correct guideline without the career offender enhancement and his sentence was then reduced by 40%, he would currently be serving a sentence between 180 and 196 months, which is well below the sentence he received.[7]

The Movant asserts that his sentence was imposed in violation of the Constitution and laws of the United States, and is therefore cognizable under § 2255 (DE # 9). He contends that his due process rights were violated because his sentence was based upon misinformation concerning his career offender status. Similarly, Mr. Beckles argues that the change in law regarding what constitutes a violent felony for purposes of classifying a defendant as a career offender is a substantive change in the law, which resulted in a fundamental miscarriage of justice regarding his sentence since the incorrect law was applied to his sentence, and he therefore received a harsher sentence than he would have received had the correct law been applied. Finally, Mr. Beckles distinguishes those cases which have declined to consider challenges to sentencing

---

[7] Although 40% of the lower end of the guideline range computed without the career offender enhancement is only 157 months, Mr. Beckles acknowledges that he was properly classified as an armed career criminal and is subject to a mandatory minimum sentence of 15 years (180 months) pursuant to 18 U.S.C. § 924(e) (DE # 1 at 10).

guidelines determinations on collateral review, asserting that any need to foreclose review pursuant to § 2255 in the interests of finality does not apply to this case, where his claim was preserved on direct appeal, this is his first motion for relief under § 2255, and this motion was timely filed.

In its response to the Motion to Vacate, the Government concedes that Mr. Beckles' § 2255 Motion is timely. However, the Government contends that Mr. Beckles is not entitled to relief pursuant to § 2255 because the sentencing defect is not a constitutional claim, does not involve a lack of jurisdiction, does not relate to a sentence that exceeds the statutory maximum, does not lead to a complete miscarriage of justice, and is thus not cognizable under § 2255 (DE # 8 at 5). The Government asserts that challenges to the advisory sentencing guidelines are materially different than challenges to sentences that are in excess of the statutory maximum and different from cases where a prior conviction that served as the basis of an enhancement is vacated. The Government further contends that Mr. Beckles' statutory sentencing range as an armed career criminal was between fifteen years and life imprisonment, and thus the sentence that Mr. Beckles received fell within the statutory range; and, the Government notes that the 360-month sentence that Mr. Beckles initially received "was only 33 months above the 'correct' guideline range." (DE # 8 at 12). Further, the Government emphasizes the difference in the scope of review for claims raised on direct appeal versus those raised in a collateral proceeding, and contends that an error that may justify reversal on appeal does not necessarily mean that the same issue is cognizable in the § 2255 context (DE # 20). In addition, the Government contends that the ruling of the Eleventh Circuit Court of Appeal in *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1001 (2012), is relevant to this action because the reviewing Court in *Gilbert*,

among other things, flatly rejected the movant's claim that his career offender enhancement at sentencing constituted a miscarriage of justice because he was actually innocent of being a career offender; and further, because the Court made clear that a challenge to a misapplied guideline does not rise to a constitutional violation. The Government argues that the holding in *Gilbert* emphasizes the need for finality in criminal actions and the inapplicability of § 2255 to guideline calculation errors.

The Government also, in essence, asserts that because the federal sentencing guidelines are now advisory, a miscarriage of justice may not be based upon the misapplication of the career offender guideline (DE # 20 at 13-14). Further, the Government contends that because Mr. Beckles' sentence falls within the statutory limits, a sentence that exceeds a particular guideline range does not constitute a miscarriage of justice. The Government also contends that because the Court could impose the same sentence upon Mr. Beckles at resentencing, that sentence cannot be considered to be a fundamental defect in the proceedings so long as that sentence is reasonable. Finally, in a footnote, in its Supplemental Response the Government argues that the Movant procedurally defaulted on the sentencing issue by failing to raise the claim before the District Court at sentencing (DE # 20 at 12 n.7). The Government states, however, that the Government inadvertently failed to raise this issue in its initial response to the Movant's Motion and thus concedes that it waived the procedural default argument. The Government therefore urges the Court to *sua sponte* invoke the procedural bar to this action.

IV. LEGAL FRAMEWORK

Title 28 United States Code, section 2255, entitled "Federal custody; remedies on motion attacking sentence" provides, *inter alia*,

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Thus, § 2255 "does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). Rather, a federal prisoner may file a § 2255 motion if the movant claims that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a).

The Supreme Court has made clear that an error of law provides a basis for collateral attack only when "the claimed error constitute[s] a fundamental defect which inherently results in a complete miscarriage of justice." *Addonizio*, 442 U.S. at 185; *accord Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) ("relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice") (internal quotation marks and citations omitted). A non-constitutional error that may justify reversal on direct appeal does not generally support a collateral attack on a final judgment, unless the error (1) could not have been raised on direct appeal and (2) would, if condoned, result in a complete miscarriage of justice. *Lynn*, 365 F.3d at 1233 (citations omitted). A non-constitutional error that results in a miscarriage of justice "should present exceptional circumstances where the need for the remedy afforded by the writ of habeas

corpus is apparent." *Hill v. United States*, 368 U.S. 424, 428 (1962) (quotation omitted). Errors that seriously undermine the validity of criminal proceedings have been held to constitute a miscarriage of justice. *See, e.g., Davis v. United States*, 417 U.S. 333, 346-47 (1974) (holding that a prisoner's claim that he was convicted for a legal act was cognizable under § 2255); *United States v. Behrens*, 375 U.S. 162 (1963) (holding that prisoner was entitled to relief under § 2255 where his sentence was imposed outside of the prisoner's or counsel's presence); *Ayuso v. United States*, 361 Fed. App'x 988, 991 (11th Cir. 2010) (distinguishing guideline miscalculation sentencing claims from errors that constitute a miscarriage of justice which implicate a fundamental defect in the validity of the district court proceedings).

V. ANALYSIS [1]

A. The Motion to Vacate pursuant to § 2255 is Timely

The Government concedes that Mr. Beckles' Motion to Vacate is timely, and the undersigned agrees with that concession. Pursuant to Title 28, United States Code,

---

[1] As stated previously, the undersigned has not analyzed the issues which the Government has "mentioned" in the course of proceedings, but not relied on in presenting its opposition. Specifically, the Government has not challenged the retroactive applicability on collateral review of the holdings in *Begay* or *Archer* regarding what constitutes a crime of violence, or that these decisions control the interpretation of the career offender provision of the Sentencing Guidelines in the context of this Motion to Vacate. In addition, the undersigned declines to engage in the Government's suggestion that the Court *sua sponte* determine that the Movants' claims are procedurally defaulted because the Movant did not present the career offender enhancement argument to the District Court. It is undisputed that the Movant raised such arguments on direct appeal and the Eleventh Circuit considered the merits of the arguments, and thus the Movant has satisfied the requirement that collateral issues that are capable of being raised on direct appeal must be so raised. Under the procedural default rule, "a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding." *Lynn*, 365 F.3d at 1234. In addition, the Government has waived this argument by failing to raise it in its initial response to the Motion to Vacate.

Section 2255(f)(1), a Motion to Vacate is timely if it is filed within one year from the date the conviction becomes final. When a defendant files a petition for a writ of certiorari with the Supreme Court following a direct appeal, the conviction becomes final when the Supreme Court either denies certiorari or issues a decision on the merits. *Washington v. United States*, 243 F.3d 1299, 1300–01 (11th Cir. 2001). In this case, the Supreme Court denied Mr. Beckles' petition for a writ of certiorari on October 22, 2009, and the one-year statute of limitations began to run the day after that denial. Thus, because Mr. Beckles filed his Motion to Vacate on September 30, 2010, his Motion to Vacate is timely.

B. **Mr. Beckles' § 2255 Non-Constitutional Claim is not Cognizable on Collateral Review as His Sentence Does Not Constitute a Fundamental Defect Resulting in a Miscarriage of Justice**

1. **Mr. Beckles' Has Not Raised a Cognizable Claim Pursuant to the United States Constitution or the Laws of the United States**

The Eleventh Circuit has stated that, as a threshold matter, a court examining a motion to vacate a sentence must determine whether the claim is cognizable. *Burke v. United States*, 152 F.3d 1329, 1331 (11th Cir. 1998); *Ayuso v. United States*, 361 Fed. App'x 988 (11th Cir. 2010). By the plain language of 18 U.S.C. § 2255, claims raised in a motion to vacate which assert that a sentence is imposed in violation of the Constitution or in violation of the laws of the United States are cognizable upon collateral review.

In the instant case, the Movant argues that his sentence was imposed in violation of the Constitution (DE # 9 at 2).[9] Specifically, the Movant asserts that his constitutional

---

[9] In the Motion to Vacate, Mr. Beckles did not address the issue of cognizability under § 2255 but rather only argued that his sentence should be set aside due to the rulings in *Begay* and *Archer* which concluded that a felon in possession of a firearm did not constitute a crime of violence. When the Government in response to the Motion raised the issue of cognizability, Mr. Beckles addressed the issue for the first time in his Reply.

due process rights were violated when the Court misapplied the guidelines. However, that argument has been rejected by the Eleventh Circuit. In *Gilbert v. United States*, the Eleventh Circuit Court of Appeals, sitting en banc stated,

> Gilbert's claim that a sentencing guidelines provision was misapplied to him is not a constitutional claim. If it were, every guidelines error would be a constitutional violation. However prescient the Founders may have been in other respects, they did not think to incorporate the sentencing guidelines into the Constitution or Bill of Rights. Nor is it plausible to suggest, as Gilbert does, that every error adversely affecting a defendant's sentence violates the Due Process Clause. Sometimes a cigar is just a cigar, and sometimes an error is just an error.

640 F. 3d at 1321-22. Further, the cases cited by the Movant to support his claim that his constitutional due process rights were violated are distinguishable from the case at bar because those cases involved a sentencing court's misapprehension of certain underlying facts related to a defendant's conviction. In *Townsend v. Burke*, 334 U.S. 736 (1948), the Supreme Court stated that a trial court violates the constitutional right to due process when it relies on "extensively and materially false" information, which the defendant had no opportunity to correct through counsel. There is no dispute that Mr. Beckles was represented by counsel and given an opportunity to challenge the district court's factual determinations with regard to his sentence. Similarly, in *Shukwit v. United States*, 973 F. 2d 903 (11th Cir. 1992), the movant raised a factual objection to a misstatement in the PSI regarding whether the defendant was a "principal" or "main distributor" of controlled substances. In finding that the defendant was entitled to § 2255 relief, the Court opined that a defendant has the right to not be sentenced on the basis of false information, which clearly is a different issue than the issue raised in this case–whether a change in definition under the guidelines raises a cognizable issue under

§ 2255. Further, the court in *United States v. Dean*, 757 F. 2d 535 (11th Cir. 1985), considered whether a sentence predicated upon the sentencing Court's mistaken assumption about the length of time that the defendant would serve in prison prior to parole violated the defendant's due process rights and would entitle a defendant to collateral relief.[10] In this case, the sentencing Court did not sentence Mr. Beckles based upon factual inaccuracies, rather, Mr. Beckles challenges the Court's sentence based upon a purported legal error in the application of the guidelines. As stated above, *Gilbert* holds that such a challenge does not raise a constitutional issue. Thus, the Movant has failed to present a cognizable constitutional claim under the facts of this case.

Similarly, to the extent that the Movant argues that Mr. Beckles' sentence was imposed in violation of the laws of the United States, that argument fails, as well (DE # 9 at 4). First, it is undisputed that Mr. Beckles was sentenced within the statutory maximum for his conviction. Generally, when the sentence falls within the statutory range, it is not a cognizable constitutional issue in habeas proceedings. *Townsend v. Burke*, 334 U.S. 736, 741 (1948). In addition, in *Gilbert*, 640 F.3d at 1307-07, the Eleventh Circuit cited, with seeming approval, *Scott v. United States*, 997 F.2d 340, 341 (7th Cir. 1993), for the proposition that sentencing guidelines are not "laws" within the meaning of § 2255. It is for a similar reason that the Movant's reliance on *Davis v. United States*, 417 U.S. 333, 346 (1974), is misplaced. *Davis* examined the imposition of a sentence based upon a substantive change in the law which rendered the defendant's conduct no longer criminal and thus did not involve a purported misapplication of the guidelines, which

---

[10] Notably, the Court in *Dean* concluded that the "mistake" by the sentencing court regarding the length of time the defendant would serve did *not* render the sentence illegal and did not violate the defendant's constitutional due process rights. *Id.* at 543.

again, are not laws. In this case, as discussed in greater detail below, there is no assertion that possession of a shot gun by a felon is not a crime. Thus, *Davis* is inapplicable. The Movant has therefore failed to point to any law of the United States that his sentence violated, and thus has failed to state a cognizable claim based upon such a violation.

2. **Neither the Eleventh Circuit nor Courts in this District Have Held that a Career Offender Guideline Application Error is Cognizable under § 2255**

In the Eleventh Circuit, whether a challenge to a sentence based upon a misapplication of the guideline sentencing range, which does not exceed the statutory maximum penalty, is ever cognizable on collateral review remains an open issue.[11] Indeed, over the past few years, the Eleventh Circuit has consistently declined to determine whether a purported misapplication of a guideline range is cognizable on an initial § 2255 motion such as the one at bar. However, in order to place this matter into proper context, and to evaluate the cognizability of the Movant's claim, it is helpful to examine recent holdings in this circuit regarding § 2255 challenges to the application of the Federal Sentencing Guidelines.

In *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011) (en banc), for example, the Eleventh Circuit examined whether a federal defendant who asserted that the district court had erroneously calculated his guideline sentence was entitled to relief pursuant to the savings clause contained in 28 U.S.C. § 2255(e).[12] In *Gilbert*, the defendant was

---

[11] As mentioned previously, in the Introduction, the Government has only properly challenged the Movant's Motion on the basis of whether Mr. Beckles raised a cognizable claim and not on the basis of procedural default or any other grounds.

[12] Section 2255(e) permits a federal prisoner to seek habeas corpus relief only if the remedy of filing a Motion to Vacate pursuant to § 2255(a) "is inadequate or ineffective

sentenced as a career offender under § 4B1.1 of the Federal Sentencing Guidelines based on two prior convictions, one of which was carrying a concealed weapon, which was deemed at the time of his sentencing to be a "crime of violence." *Id.* at 1299. Although the defendant argued prior to his sentencing and on direct appeal that carrying a concealed weapon did not qualify as a crime of violence, he failed to raise that issue in his initial *pro se* § 2255 motion. *Id.* at 1301. Several years after his initial § 2255 motion was denied, Mr. Gilbert, through counsel, filed a motion seeking to amend his § 2255 motion to raise additional issues including challenging the application of the career offender enhancement to his sentence, in light of the Supreme Court's holding in *Begay* and the Eleventh Circuit's holding in *Archer*. The district court denied Mr. Gilbert's motion to amend concluding that the motion was actually a successive § 2255 motion barred by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). That determination was initially overturned by the Eleventh Circuit but subsequently was affirmed by the Eleventh Circuit en banc after a rehearing on the issue. Although the en banc Court in *Gilbert* characterized the primary question presented as "whether a federal prisoner can use a habeas corpus petition to challenge his sentence" and proceeded to answer that question in the negative where the sentence did not exceed the statutory maximum, the Court explicitly stated that it was not deciding whether a guideline misapplication claim based upon a change in the law could ever be brought in an initial § 2255 motion. *Id.* at 1306. Therefore, the Court was not directly presented with the issue of whether Mr. Gilbert's claim may have been cognizable on his initial § 2255, but rather only determined that the savings clause of § 2255(e) which provides for relief pursuant to

---

to test the legality of his detention."

§ 2241 under certain circumstances, may not be used to remedy a miscalculation of the sentencing guidelines where that issue may no longer be raised on a § 2255 motion. *Id.* at 1307.

Similarly, in *McKay v. United States*, 657 F.3d 1190 (11th Cir. 2011), the Eleventh Circuit declined to determine whether a defendant who asserted that he was improperly designated as a career offender pursuant to U.S.S.G. § 4B1.1 raised a cognizable § 2255 challenge. The movant argued to the district court that his sentence was illegal because, pursuant to the rulings in *Begay* and *Archer*, one of his prior convictions was no longer considered to be a crime of violence. The district court denied the movant's § 2255 motion based upon its determination that a claim of a misapplication of the guidelines was not cognizable under § 2255 absent a showing that the issue could not have been raised in direct appeal and if the court's failure to grant relief would result in a complete miscarriage of justice. *Id.* at 1195. Although the District Court denied the defendant's request for a Certificate of Appealability, the Eleventh Circuit granted the movant a Certificate of Appealability, framing the issue for appeal as follows, "Whether the district court erred in finding [McKay's] sentencing claim about the career-offender enhancement is not cognizable in proceedings under 28 U.S.C. § 2255, and, if cognizable, whether this sentencing claim is procedurally defaulted in any event." *Id.* at 1195. However, in its opinion on the § 2255 Motion, the Eleventh Circuit never reached the issue of cognizability but instead stated, "Because we hold that McKay's sentencing claim is procedurally defaulted and that the actual innocence exception does not apply to excuse his default, we leave for another day the question of whether this type of claim is cognizable under § 2255 in the first instance." *Id.* at 1195. *See also Orso v. United States*, 452 Fed. App'x 912, 913 n.4 (11th Cir. 2012) (assuming without deciding that movant

raised cognizable § 2255 claim attacking sentence predicated on misapplication of federal sentencing guideline career offender enhancement, and then denying claim as procedurally defaulted); *Rivers v. United States*, 476 Fed. App'x, 848, 850 n.1 (11th Cir. May 21, 2012) (declining to determine whether § 2255 movant's claim that he was actually innocent of crime of violence under guidelines was cognizable, and instead denying relief because motion was procedurally defaulted).

While the Eleventh Circuit has not determined this exact issue but has rather denied § 2255 guideline sentencing claims on procedural grounds, the undersigned is aware that several other district courts have examined whether a movant challenging the application of the career offender guideline enhancement raised a cognizable claim in an initial § 2255 motion.[13] In *Gonzalez v. United States*, No. 8:11-cr-1474-T-17EAJ, 2012 WL 279451, at *1 (M.D. Fla. Jan. 31, 2012), for example, a district court examined a motion to vacate pursuant to § 2255 which challenged the court's designation of the movant as a career offender at sentencing based upon a crime that was subsequently determined to not qualify as a crime of violence for purposes of the career offender enhancement. Although the Court determined that the Movant's motion was procedurally barred as untimely and due to his failure to raise the issue on direct appeal, the Court also determined that the claim was not cognizable in a § 2255 proceeding. In so doing, the

---

[13] The undersigned is aware that in *Young v. United States*, 936 F.2d 533 (11th Cir. 1991), which the Movant cites in his Supplemental Brief (DE # 19 at 5), the Eleventh Circuit granted relief pursuant to a § 2255 Motion, where the movant sought to vacate his sentence which included a career offender enhancement under the guidelines. However, the Court in *Young* never addressed the cognizability issue and thus that opinion does not provide any direct guidance on the cognizability issue in this case. In addition, the undersigned notes that the Court's opinion was issued prior to the Eleventh Circuit's recent decisions in *Gilbert* and *McKay*. Notably, the Eleventh Circuit did not cite the *Young* decision for purposes of analyzing the scope of collateral relief in either of those cases.

Court first noted that neither the Supreme Court nor the Eleventh Circuit had ever held that an error in the application of the sentencing guidelines, that does not result in the imposition of a sentence that exceeds the statutory maximum for the offense of conviction, presents a constitutional claim. *Id.* at *5. The Court, therefore, concluded that the Movant had not identified a constitutional claim which would normally be cognizable on a § 2255 challenge.

The Court then examined whether the movant had raised a claim that constituted a "fundamental defect which inherently resulted in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure." *Id.* at *5. In so doing, the Court observed that certain claimed errors, even if meritorious on direct appeal, are not cognizable in a § 2255 proceeding. *Id., citing Lynn v. United States*, 365 F 3d 1225 (11th Cir. 2004). In addition, the Court noted that neither the Supreme Court nor the Eleventh Circuit had held that an ordinary error in the application of the sentencing guidelines, even one that erroneously results in the application of the career offender guideline to increase a defendant's offense level significantly, constitutes the type of non-constitutional error that is cognizable in a § 2255 proceeding. Finally, the Court observed that the movant's sentence was well within the applicable statutory maximum term of imprisonment. The Court therefore concluded that the movant's sentence, viewed objectively, was not "illegal" or a "miscarriage of justice" because it conformed to the applicable penalty statute, did not exceed the statutory maximum, and could be reimposed even without the career offender enhancement. *Id.* at *6.

Similarly, in *Harris v. United States*, No. 8:11-CV-T-30TBM, 2011 WL 5834749, at *1 (M.D. Fla. Nov. 21, 2011), a district court opined that an initial § 2255 motion which challenged the application of the career offender enhancement as improper because one

of the underlying crimes upon which the enhancement was predicated was subsequently determined not to be a crime of violence, did not entitle the movant to relief because the motion was untimely. However, the Court noted that even if the motion to vacate had been timely, the movant still would not be entitled to relief because a challenge to a trial court's application of the sentencing guidelines is a non-constitutional issue that provides no basis for collateral relief. *Id.* at *3 (citing *Lynn v. United States*, 365 F.3d 1225 (11th Cir. 2004); *Burke v. United States*, 152 F.3d 1329, 1331-32 (11th Cir. 1998)); *accord Ware v. United States*, No. 09-60185-CIV, 2009 WL 2567023, * 8 (S.D. Fla. May 14, 2009) (denying § 2255 claim of improper application of guidelines as a non-cognizable claim absent a fundamental defect rising to miscarriage of justice, and collecting other cases denying § 2255 motions predicated upon a misapplication of the guidelines).

In this case, although the Movant raised the career offender enhancement issue on direct appeal, and timely filed his Motion to Vacate, much like the movants in *Gonzalez* and *Harris*, Mr. Beckles has not asserted that a misapplication of the sentencing guidelines resulted in the imposition of a sentence in excess of the statutory maximum penalty for his crime of conviction. Rather, the Movant has only contended that the sentencing Court misapplied the guidelines to his sentence which resulted in a sentence higher than the sentence he would have received had the correct guideline been applied. As stated above, and made clear by the applicable case law, such a claim is not cognizable on a § 2255 motion seeking collateral relief. This conclusion is not altered by the fact that this same claim may have entitled the movant to relief if it had been raised on direct appeal after the Supreme Court's ruling in *Begay* and the Eleventh Circuit's ruling in *Archer*. Rather, as stated above, § 2255 "does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). As

such, the movant has not raised a cognizable claim.

3. **The Movant's Sentence Does Not Constitute a Fundamental Miscarriage of Justice**

Even assuming *arguendo* that guideline sentencing errors may be cognizable under § 2555, the Movant is still not entitled to relief as he has failed to demonstrate that his sentence constitutes a miscarriage of justice. Indeed, as correctly stated by the Movant in his Reply brief and conceded at oral argument, the central issue in this matter is whether the "misapplication" of the career offender guideline presents a fundamental miscarriage of justice (DE # 24-4). Implicit in this query is the fact that, as discussed above, typically sentencing errors based upon a misapplication of the guidelines are not cognizable on § 2255 grounds, unless there is a fundamental miscarriage of justice. Thus, the undersigned examines what constitutes a fundamental miscarriage of justice to determine whether Mr. Beckles is entitled to relief pursuant to § 2255.

In *Johnson v. Alabama*, 256 F.3d 1156 (11th Cir. 2001), the Eleventh Circuit described a "fundamental miscarriage of justice" as follows,

> If a petitioner cannot show cause, he may still survive a procedural bar by proving that the failure to hear the merits of his claim would endorse a fundamental miscarriage of justice. *See Murray*, 477 U.S. at 495, 106 S.Ct. at 2649. This exception is exceedingly narrow in scope, as it concerns a petitioner's "actual" innocence rather than his "legal" innocence. *See Calderon v. Thompson*, 523 U.S. 538, 559, 118 S.Ct. 1489, 1502-03, 140 L.Ed.2d 728 (1998); Murray, 477 U.S. at 495-96, 106 S.Ct. at 2649 (explaining that a "fundamental miscarriage of justice" occurs "in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent").

Id. at 1171. In *Johnson*, although the Court considered whether a fundamental miscarriage of justice had occurred which was sufficient to overcome a procedural bar in the § 2254 context, the Court's language illustrates that the miscarriage of justice

standard is exceedingly narrow in scope.

Consistent with this conclusion, in *Ayuso v. United States*, 361 Fed. App'x 988 (11th Cir. 2010), the Court, in rejecting a movant's § 2255 challenge to his sentence predicated upon a miscalculation of his criminal history points stated,

> A non-constitutional error that results in a miscarriage of justice "should present exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Hill v. United States*, 368 U.S. 424, 428 (1962) (quotation omitted). Errors that seriously undermine the validity of criminal proceedings have been held to constitute a miscarriage of justice. *See, e.g., Davis v. United States*, 417 U.S. 333, 346-47 (1974) (holding that a prisoner's claim that he was convicted for a legal act was cognizable under § 2255); *United States v. Behrens*, 375 U.S. 162, 164-66 (1963) (holding that prisoner was entitled to relief under § 2255 where his sentence was imposed outside of the prisoner's or counsel's presence).

Id. at 991 (parallel citations omitted). The Court continued:

> Here, Ayuso's sentencing claim is not cognizable under § 2255 because it is not a constitutional error and does not rise to the level of a miscarriage of justice. In his pleadings below and in his brief on appeal, Ayuso does not indicate that the alleged miscalculation of his criminal points implicates a constitutional error. In addition, Ayuso's sentencing claim is distinguishable from those errors that have been held to constitute a miscarriage of justice, as these errors implicated a fundamental defect in the validity of the district court proceedings.

Id. Similarly, in *Vallas v. United States*, No. 09-00754-CG, 2012 WL 2681398, at * 5 (S.D. Ala. June 7, 2012), a district court concluded that a movant's § 2255 claim that a misapplication of guidelines prior to a change in law as to what constituted a crime of violence for purposes of calculating the movant's criminal history points, did not "so 'seriously undermine[d] the validity of [his] criminal proceedings' that it would, if condoned constitute a miscarriage of justice." *Id.* at *5, citing *Ayuso v. United States*, 361

Fed. App'x 988, 991 (11th Cir. 2010).

Based upon the applicable case law, under the facts of this case, Mr. Beckles is not entitled to relief on the grounds of a miscarriage of justice because his sentence does not meet that exceedingly narrow scope that implicates a fundamental defect in the validity of the district court proceedings. Indeed, it is undisputed that had Mr. Beckles been sentenced without a guideline career offender enhancement, his guideline sentencing range would have been between 262 and 327 months. In addition, it is undisputed that even without the guideline career offender enhancement, Mr. Beckles would be subject to a fifteen year minimum mandatory sentence (180 months) pursuant to 18 U.S.C. § 924(e), the Armed Career Criminal statute. Finally, due to the Rule 35 reduction awarded to Mr. Beckles, he is currently serving a sentence of 216 months. Mr. Beckles therefore is currently serving a sentence which is 46 months below the guideline range that the Movant contends is the proper guideline range. As such, under the facts of this case, Mr. Beckles has failed to show that his sentence is "illegal" or a "miscarriage of justice" as it does not exceed the statutory maximum and could be reimposed even without the career offender enhancement. The undersigned is therefore unable to conclude that his sentence constitutes a miscarriage of justice, and thus he is not entitled to relief pursuant to § 2255.[14]

---

[14] Although the Movant contends, and the Government concedes, that the sentencing court likely would have granted the Movant a 40% reduction on his sentence even if he had been sentenced to the correct guideline at his initial sentencing, this fact does not alter the conclusion that a challenge to the misapplication of the guidelines does not present a cognizable § 2255 claim where the movant is already serving a sentence within the correct guideline range and the sentence does not exceed the statutory maximum.

4. The Movant is not Actually Innocent of Being a Career Offender

The Movant attempts to demonstrate that his sentence rises to the level of a miscarriage of justice and thus is cognizable on a § 2255 claim, by implying that Mr. Beckles is actually innocent of being a career criminal (DE # 19 at 4). In this regard, Mr. Beckles does not assert that he is actually innocent of being a felon in possession of a firearm. Rather, he contends that because the career offender enhancement requires a finding that the crime of conviction is a "crime of violence," which the crime of felon in possession is not, that he is not a career offender under the guidelines.

This very argument was rejected by the Eleventh Circuit in *McKay* and *Gilbert*. The Eleventh Circuit has consistently held that actual innocence in sentencing can only be established if the person is factually innocent of the underlying crime, or if the crime for which the person is sentenced is later determined to not constitute criminal conduct.[19]

In *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011) (en banc), although the Court considered whether the Movant had properly presented an actual innocence claim in the context of whether that claim was sufficient to overcome a procedural default, that case nonetheless provides guidance as to whether Mr. Beckles has presented an "actual innocence" claim in this action. The movant in *Gilbert* argued, *inter alia*, that he was actually innocent of being a career offender, but the Eleventh Circuit categorically rejected that claim, explaining that the defendant was neither charged with, nor convicted of, being a career offender. *Id.* at 1304–05. *Accord Bido v. United States*, 438 Fed. App'x

---

[19] For purposes of this Report and Recommendation, the undersigned assumes, without deciding, that actual innocence of sentence claims may be raised in a non-capital sentencing context. *See Rivers v. United States*, 476 Fed. App'x 848, 849-50 (11th Cir. 2012) (discussing limitation of actual innocence exception to procedural default context where movant challenges imposition of non–capital sentence).

746 (11th Cir. 2011) (rejecting movant's actual innocence claim of guideline misapplication raised in an attempt to excuse procedural default of § 2255 claims).[16]

Similarly, in *McKay v. United States*, 657 F.3d 1190, 1196–97 (11th Cir. 2011), the Eleventh Circuit rejected a petitioner's § 2255 actual innocence claim where the petitioner argued that his conviction for carrying a concealed weapon had been misclassified as a crime of violence for purposes of a § 4B1.1 sentence enhancement. *Id.* at 1194–95. The reviewing Court denied the petitioner's claim, opining that an alleged misclassification of a crime was a legal argument, and the petitioner did not assert that he was factually innocent of carrying a concealed weapon. *Id.* at 1199. Thus, the Court declined to extend the actual innocence of sentence exception to claims of legal innocence of a predicate offense used to justify an enhanced sentence. *Accord Stevens v. United States*, 446 Fed. App'x 789 (11th Cir. 2012) (same).

Finally, in *Orso v. United States*, 452 Fed. App'x 912 (11th Cir. 2012), the reviewing Court, after assuming arguendo that the Movant had raised a cognizable § 2255 claim, examined whether the movant had provided sufficient grounds to excuse his procedural default related to his collateral challenge to a career offender enhancement. The Court concluded that the Movant had failed to prove that he was actually innocent of the underlying conduct upon which the career enhancement was based, and that he therefore failed to demonstrate that a "fundamental miscarriage of justice" had occurred in the

---

[16] It is for this same reason, as discussed *supra*., that the Movant's citation to cases where sentencing courts misapprehended certain underlying facts related to a defendant's convictions are not applicable here. The sentencing Court in this case did not sentence Mr. Beckles based upon factual inaccuracies, rather, Mr. Beckles challenges his sentence based upon a legal analysis. Again, Mr. Beckles does not contend here that the Court was mistaken about the fact that he was a felon in possession of a short-barreled shotgun.

application of the career offender enhancement to his sentence. The Court reached that opinion notwithstanding the fact that the Eleventh Circuit had, subsequent to the movant's sentencing, held that the underlying conduct, fleeing or attempting to elude the police, was not a "violent felony" for purposes of supporting the imposition of the career offender enhancement. Thus, the Court concluded that the change in the law regarding what constituted a violent felony for purposes of a career criminal enhancement was insufficient, absent a claim of actual innocence, to provide a basis for excusing a procedurally defaulted claim under § 2255.[17]

In a further attempt to demonstrate that the sentencing guideline error raised by Mr. Beckles is cognizable on a § 2255 motion and rises to a miscarriage of justice, the Movant, in his Supplemental Reply relies heavily on *Narvaez v. United States of America*, 674 F.3d 621 (7th Cir. 2011) and *Johnson v. United States*, 544 U.S. 295 (2005). In *Narvaez*, the defendant was convicted of an offense that normally would have resulted in a guideline range of between 100 and 125 months. *Narvaez*, 674 F.3d at 624. However, the district court found that the defendant was a career offender, which resulted in the defendant receiving a career offender enhancement that increased his guideline range to between 151 and 188 months. The Court sentenced the defendant under the then-mandatory guidelines to 170 months of incarceration. The defendant thereafter filed a motion for collateral relief pursuant to 28 U.S.C. § 2255, claiming that the Supreme Court's rulings in *Begay* and *Chambers v. United States*, 522 U.S. 122 (2009) had effected a subsequent change in law which rendered his sentence as a career offender improper

---

[17] The Court in *Orso* again left open the question of whether a successful claim could be made on an initial § 2255 on this basis. However, the undersigned cites to *Orso* for its analysis of "actual innocence" for purposes of establishing whether a miscarriage of justice has occurred.

because the crimes that served as the basis for this enhancement were no longer crimes of violence.[18] The district court denied the defendant's § 2255 motion finding that the rulings in *Begay* and *Chambers* did not apply retroactively to cases on collateral review.

The Seventh Circuit Court of Appeals, however, reversed the district court and held that the subsequent case law did apply retroactively to the defendant's case. *Id.* at 625. The Court then noted that although sentencing errors are "generally not cognizable on collateral review," such errors are cognizable on collateral review when "a postconviction clarification in the law has rendered the sentencing court's decision unlawful." *Id.* at 627. The Court analogized Mr. Narvaez's case to *Davis v. United States*, 417 U.S. 333 (1974), in which the Supreme Court held that a subsequent interpretation of a statute which resulted in the defendant being convicted and punished "for an act that the law does not make criminal" was cognizable under 28 U.S.C. § 2255, and would constitute "a complete miscarriage of justice" if the defendant were not granted relief. *Id.* In so doing, the reviewing Court in *Narvaez* acknowledged that *Davis* provided for relief "when a defendant is innocent of the underlying crime," but the Court nevertheless concluded that the rationale applied in *Davis* was sufficiently analogous to Narvaez's claim that he did not qualify as a career criminal at the time of his sentence to entitle Mr. Narvaez to § 2255 relief. *Id.*

Further, the Court stated that the career offender enhancement, among other things, "created a legal presumption that [the Defendant] was to be treated differently

---

[18] As mentioned above, *Begay v. United States*, 533 U.S. 137 (2008), narrowed the definition of what constituted a violent felony under the Armed Career Criminal Act. In *Chambers v. United States*, 522 U.S. 122 (2009), the Supreme Court analyzed the definition of "violent felony" under the Armed Career Criminal Act and concluded that a conviction for knowingly failing to report to a penal institution was not a violent felony under that statute.

from other offenders because he belonged in a special category reserved for the violent and incorrigible," and that "[s]peculation that the district court might today impose the same sentence is not enough to overcome the fact that, at the time of his initial sentencing, [the Defendant] was sentenced based upon the equivalent of a nonexistent offense." *Id.* The Court concluded by stating that while the Defendant "does not have an absolute right to a lower sentence," he "does have an absolute right not to stand before the court as a career offender when the law does not impose that label on him." *Id.*

However, *Narvaez* is distinguishable from the instant case for the following reasons. First, subsequent to the district court's determination in *Narvaez*, the United States Sentencing Guidelines have become advisory rather than mandatory. While this fact, standing alone, may not have altered the reviewing court's conclusion that the movant's sentence constituted a miscarriage of justice, it is significant that the Court in *Narvaez* referred to the then-mandatory nature of the Guidelines throughout the opinion. Indeed, the Court in *Narvaez* specifically stated, "Moreover, at the time of Mr. Narvaez's sentencing, the Guidelines were *mandatory*. The imposition of a career offender status therefore increased the sentencing range the district court was authorized to employ." See *United States v. Booker*, 543 U.S. 220, 234 (2005) ("Because [the Guidelines] are binding on judges, we have consistently held that the Guidelines have the force and effect of laws.")" *Id.* at 628-29.

In this case, unlike in *Narvaez*, the Court had the authority to depart from the advisory guidelines, either upward or downward. In this regard, it is worth noting that, at the sentencing hearing, the Court stated,

> When I look at the exhibits which have been introduced today, the certified copies of the prior convictions, what stands out is that the defendant was never appropriately punished for

> any of his prior felony convictions. You weren't simply given one pass, Mr. Beckles. You were given too many passes and, perhaps, that sent the wrong message to you.
>
> . . . .
>
> I am not persuaded, . to depart from the advisory Guideline range here and sentence you outside of the Guidelines.
>
> I have given careful consideration to the statutory factors contained in 18 U.S.C. §3553. I am mindful of the need to have this sentence reflect upon the seriousness of the offense, provide deterrence and safeguard the community from you, Mr. Beckles, because you have shown that you cannot live within the law.

(Cr. DE # 75: October 17, 2007 Sentencing Tr. at 41-43). Thus, the Court recognized that it had the authority to impose a sentence that it felt was appropriate notwithstanding the guideline range.[19]

In addition, in order to extend the Court's reasoning in *Narvaez* to the instant matter, this Court would have to equate the magnitude of a misapplication of an advisory guideline to that of a conviction and sentencing of a defendant for conduct which does

---

[19] In *Narvaez*, the movant sought to have his sentence vacated where the trial court relied upon two prior state convictions to apply the career offender enhancement to his sentence, where it had been later determined that the prior state convictions did not constitute crimes of violence as contemplated by the career offender statute. The case at bar is distinguishable from those cases where an enhancement predicated upon a state conviction is found to be cognizable on a § 2255 motion to vacate because the state conviction has been vacated. In such cases, the Eleventh Circuit has made clear that a movant may challenge that enhancement. *United States v. Walker*, 198 F. 3d 811 (11th Cir. 2000); *Stewart v. United States*, 646 F. 3d 856 (11th Cir. 2011). *See, e.g., Bazemore v. United States*, No. CV411-259, 2012 WL 3552702, at *1 (S.D. Ga. Aug. 15, 2012) (finding that § 2255 movant was entitled to relief where prior state sentences, upon which federal enhancements were predicated, were vacated.) The Eleventh Circuit has made no such determination in cases where the defendant only seeks to challenge the application of a guideline enhancement to his sentence without more. Such a distinction is of particular significance under the facts of this case, where the Movant is currently serving a sentence which falls within the purported "correct" guideline range.

not constitute a crime.[29] As discussed above, the Eleventh Circuit has held that a conviction and sentencing for behavior that is no longer criminal is not analogous to the situation where a movant challenges his innocence to a guideline enhancement. *See McKay v. United States*, 657 F.3d 1190, 1199 (11th Cir. 2011). Thus, the undersigned concludes that the *Narvaez* case, which is not binding on this Court, is distinguishable from the instant case; and, more significantly concludes that based upon the relevant Eleventh Circuit case law, *Narvaez* likely would be decided differently in this Circuit.

Instead, the undersigned concludes that, as opposed to *Narvaez*, the law in the Eleventh Circuit is consistent with the en banc decision of the Eighth Circuit Court of Appeals in *Sun Bear v. United States*, 644 F.3d 700 (8th Cir. 2011) (en banc). In *Sun Bear*, the defendant pled guilty to a crime that ordinarily would have resulted in a guideline range of between 292 and 365 months. However, the Court found that the defendant was a career offender, which resulted in the defendant receiving an enhancement that increased his guideline range to between 360 months and life. *Id.* at 702. The defendant was sentenced under the then-mandatory guidelines to 360 months of incarceration. *Id.* After several cases limited the definition of a "crime of violence" for purposes of the career offender enhancement, the defendant collaterally attacked his sentence pursuant to 28 U.S.C. § 2255, alleging that his status as a career offender was imposed in violation of the law. *Id.* The defendant's Motion was denied by the district court, but a panel of the

---

[29] It bears noting that the undersigned disagrees with the Government's contention that the fact that Mr. Beckles is serving "only 33 months above the correct guideline range" demonstrates that this matter does not constitute a miscarriage of justice (DE # 8 at 12) . Rather, the undersigned agrees with Mr. Beckles' contention that, as suggested in *Glover v. United States*, 531 U.S. 198 (2001), any additional amount of actual jail time may be significant for purposes of establishing prejudice. However, because *Glover* involved a constitutional Sixth Amendment claim of ineffective assistance of counsel, *Glover* does not control resolution of this case.

Eighth Circuit reversed this decision, holding that the new cases applied retroactively to Movant Sun Bear, and concluding that the Movant could raise his claim under 28 U.S.C. § 2255 because his case "[was] based on a postconviction change in the law that renders unlawful the district court's sentencing determination." *Sun Bear v. United States*, 611 F.3d 925, 930 (8th Cir. 2010). The panel of the Eighth Circuit opined "[t]here can be no room for doubt that such a circumstance inherently results in a miscarriage of justice and presents exceptional circumstances that justify collateral relief under § 2255." *Id.*

Upon rehearing en banc, however, the Eighth Circuit reversed the decision of the panel, stating that the defendant's "collateral attack on an application of the career offender guidelines is not cognizable under 28 U.S.C. § 2255." *Id.* at 704. In reaching this conclusion, the Court reiterated that § 2255 challenges to the misapplication of the guidelines are only cognizable when they constitute a miscarriage of justice. The en banc Court opined that a sentence is not unlawful unless it is in excess of the statutory maximum and observed that the defendant's sentence in that case was within the statutory maximum. In addition, the en banc Court concluded that because the defendant was sentenced within the guideline range the defendant would have received had he not received a career offender enhancement, there was no miscarriage of justice. *Sun Bear*, 644 F.3d at 705.[21]

The *en banc* Court also distinguished *Davis v. United States*, 417 U.S. 333, 346 (1974), stating that the subsequent Supreme Court case of *United States v. Addonizio*, 442 U.S. 178, 186-87 (1979), interpreted *Davis* as stating that it would be a miscarriage of

---

[21] The initial guideline range in *Sun Bear* was between 292 and 365 months, as opposed to the career offender guideline range of between 360 months and life. The defendant had received a sentence of 360 months.

justice if a subsequent change in the law made the conduct for which a defendant was convicted and sentenced lawful, but the defendant in *Sun Bear* was convicted and sentenced for conduct that was still unlawful. *Id.* Thus the Eighth Circuit's rationale in distinguishing *Sun Bear* from *Davis* is akin to the distinction of actual innocence discussed above made by the Eleventh Circuit in *Gilbert* and *McKay*, as discussed above, and is applicable to this case. The Movant in this case, unlike the defendant in *Davis*, does not contend that he is actually innocent of being a felon in possession of a shotgun, and his actions for which he was convicted and sentenced remain illegal to this day. Accordingly, both *Sun Bear* and the case at bar are distinguishable from the situation in *Davis* that the Supreme Court concluded rose to the level of a miscarriage of justice.

Further, the Movant's reliance on *Johnson v. United States*, 544 U.S. 298 (2005) is misplaced. In *Johnson*, the Supreme Court evaluated whether the one-year statute of limitation applied to § 2255 actions was re-triggered once a state court had vacated one of the state convictions, that had been used to enhance the movant's federal sentence. In so doing, the Court in *Johnson* summarized the Supreme Court holdings in *Custis v. United States*, 511 U.S. 485 (1994) and *Daniels v. United States*, 532 U.S. 374 (2001) which made clear that certain enhanced federal sentences may be challenged when a prior state conviction supporting those enhancements has been vacated. Those cases, however, go no further than that and the undersigned is unaware of any Eleventh Circuit case that has extended those cases to a situation analogous to the sentencing guideline error presented in this case.[22] This case does not involve a vacated conviction, either state or

---

[22] The other cases cited to by the Movant regarding the availability of collateral relief in cases where a state court conviction upon which an enhancement was predicated was vacated similarly provide no additional guidance with respect to the factual scenario presented in this case.

federal. Rather, the Movant only presents an argument that the sentencing court was incorrect in the way that it interpreted and applied the career offender enhancement under the guidelines.

Finally, the undersigned notes that although the Movant downplays the importance of finality as part of the calculus in determining cognizability, finality is an important concern. In the posture of this case, the Government did not challenge the existence of an error, and the reasonable probability of a lower sentence in the absence of this error; however, the issue of cognizability applies across the board to all sentencing guidelines determinations. *See Parks v. United States*, 832 F. 2d 1244, 1246 (11th Cir. 1987) (noting that societal interests in the finality of judgment and efficiency of judicial process required that the scope of collateral attacks be more limited than direct appeals). To permit a challenge under § 2255 where the sentence imposed falls within both the statutory maximum and the correct sentencing guidelines range, would impermissibly denigrate the finality of numerous sentencing decisions made in every case. To underscore this point, there is no claim in this case that the sentence imposed exceeded the correct guideline range.

Simply put, although this case presents a close call, the undersigned concludes that Mr. Beckles' current sentence, which is well within the statutory maximum and within the guideline range that Mr. Beckles would have received had the career offender guideline not been applied to his sentence, does not constitute a miscarriage of justice. As such, Mr. Beckles has failed to demonstrate that his sentence constitutes a fundamental miscarriage of justice that warrants relief pursuant to § 2255.

VII. CERTIFICATE OF APPEALABILITY

Section 2255 Rule 11(a) provides that "[t]he district court must issue or deny a

certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." 28 U.S.C. § 2255, Rule 11(a). A timely notice of appeal must be filed even if the court issues a certificate of appealability. 28 U.S.C. § 2255, Rule 11(b).

Since this case is a close call, and the Eleventh Circuit has not expressly decided whether a Sentencing Guidelines error that results in an increased sentence is cognizable pursuant to § 2255, and there is a reasonable probability that the Movant would have received a lower sentence in the absence of the career offender enhancement, the undersigned concludes that it is appropriate for the District Court to issue a Certificate of Appealability if this Report and Recommendation is adopted. This conclusion is supported by the dissenting opinions in the analogous cases of *Rozier v. United States*, No. 11-13557, ___ F.3d ___, 2012 WL 5870123 (11th Cir. Nov. 21, 2012), and *Gilbert*, which were decided on other grounds, as well as the decision of the Seventh Circuit Court of Appeals in *Narvaez*, and the fact that the Eleventh Circuit expressly noted in *Gilbert* that it did not decide whether the claim presented in this case would be cognizable on a first time § 2255 motion. Moreover, the Eleventh Circuit has previously issued a Certificate of Appealability on the issue of whether a career offender enhancement challenge is cognizable in proceedings under § 2255. *McKay v. United States*, 657 F.3d 1190 (11th Cir. 2011).

If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the District Judge in objections to this report.

VIII. CONCLUSION

Based upon the foregoing, the undersigned respectfully

RECOMMENDS that the Motion to Vacate sentence pursuant to 28 U.S.C. § 2255 be **DENIED,** and that a Certificate of Appealability be issued, as set forth above.

The parties will have 14 days from the date of this Report and Recommendation within which to file written objections, if any, for consideration by the Honorable Cecilia M. Altonaga, United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal any factual findings contained herein. *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988); *Resolution Trust Corp. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

DONE AND SUBMITTED in chambers at Miami, Florida on December 17, 2012.

Andrea M. Simonton

ANDREA M. SIMONTON
UNITED STATES MAGISTRATE JUDGE

Copies provided to:

The Honorable Cecilia M. Altonaga,
United States District Judge

All counsel of record

A - 8

UNITED STATES of America,
Plaintiff-Appellee,

v.

Travis BECKLES, Defendant-Appellant.

No. 07-15062.

United States Court of Appeals,
Eleventh Circuit.

April 17, 2009.

Background: Defendant was convicted of being convicted felon in possession of firearm by the United States District Court for the Southern District of Florida, No. 07-20805-CR-CMA, Cecilia M. Altonaga, J., 2007 WL 2155647, and he appealed.

Holdings: The Court of Appeals, Marcus, Circuit Judge, held that:

(1) defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights, so that district court did not err in denying defendant's motion to suppress his incriminating post-arrest statements;

(2) finding that defendant knowingly possessed the firearm recovered from apartment where he lived with his girlfriend was sufficiently supported by evidence;

(3) district court did not err, let alone plainly error, in relying on the presentence investigation report's (PSI's) characterization of firearm that defendant was convicted of possessing as "sawed-off shotgun" in treating his current offense as "crime of violence," for purpose of enhancing his sentence; and

(4) sentence of 360-months imprisonment imposed on armed career criminal convicted of unlawfully possessing sawed-off shotgun was not unreasonable.

Affirmed.

1. Criminal Law ⇐1139, 1158.12

Motion to suppress presents mixed questions of law and fact, and on appeal from district court's ruling thereon, the Court of Appeals reviews district court's findings of fact for clear error and its application of the law to those facts *de novo*.

2. Criminal Law ⇐1144.12

On appeal from district court's ruling on motion to suppress, the Court of Appeals construes all facts in favor of prevailing party.

3. Criminal Law ⇐412.2(5)

Defendant may waive his right against self-incrimination, and make statement, only if he does so voluntarily, knowingly and intelligently. U.S.C.A. Const.Amend. 5.

4. Criminal Law ⇐412.2(5)

Defendant's waiver of his *Miranda* rights is "voluntary, knowing and intelligent" if it was product of free and deliberate choice, rather than of intimidation, coercion or deception, and if it was made with full awareness of both nature of rights being abandoned and consequences of decision to abandon them. U.S.C.A. Const.Amends. 5, 6.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⇐412.2(5)

Written waiver of defendant's *Miranda* rights is usually strong proof of validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. U.S.C.A. Const.Amends. 5, 6.

6. Criminal Law ⇐412.2(5)

Defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights, so that district court did not err in denying

defendant's motion to suppress his incriminating post-arrest statements, where, based on testimony of arresting officer, testimony that district court had determined was more credible than defendant's contrary testimony, defendant was read his *Miranda* rights, indicated in writing that he understood those rights and was aware of what he would give up if he chose to speak, indicated in writing that he was not under the influence of drugs or alcohol, did not appear to be under influence of drugs or alcohol, indicated in writing that he could understand English, appeared to actually understand English, and did not request an attorney or indicate that he did not wish to speak with law enforcement officers. U.S.C.A. Const.Amends. 5, 6.

7. Criminal Law ⇐1139, 1144.13(3, 5)

Court of Appeals reviews *de novo* whether there is sufficient evidence in record to support jury's verdict in criminal trial, viewing evidence in light most favorable to government, and drawing all reasonable factual inferences in favor of jury's verdict.

8. Criminal Law ⇐1159.2(7)

Evidence is sufficient to support conviction if reasonable trier of fact could find that the evidence established guilt beyond reasonable doubt.

9. Criminal Law ⇐1159.2(7, 8)

On challenge to sufficiency of evidence to support his conviction, it is not enough for defendant to put forth a reasonable hypothesis of innocence; issue is not whether jury reasonably could have acquitted, but whether it reasonably could have found guilt beyond reasonable doubt.

10. Weapons ⇐4

To establish violation of statute prohibiting convicted felons from being in possession of firearm, government must prove three elements: (1) that defendant was a convicted felon; (2) that defendant was in knowing possession of firearm; and (3) that this firearm was in or affecting interstate commerce. 18 U.S.C.A. § 922(g)(1).

11. Weapons ⇐4

In prosecution of defendant for being felon in possession of firearm, government did not need to prove actual possession, but needed to show only constructive possession through direct or circumstantial evidence. 18 U.S.C.A. § 922(g)(1).

12. Weapons ⇐4

"Constructive possession" exists, of kind sufficient to support conviction for possessory offense, when defendant exercises ownership, dominion or control over item or has power and intent to exercise dominion or control.

See publication Words and Phrases for other judicial constructions and definitions.

13. Weapons ⇐4

Defendant's mere presence in area of object or awareness of its location is not sufficient to establish "possession," of kind required to support his conviction of possessory offense.

See publication Words and Phrases for other judicial constructions and definitions.

14. Weapons ⇐17(4)

Finding that defendant knowingly possessed the firearm recovered from apartment where he lived with his girlfriend was sufficiently supported by evidence presented in firearms prosecution, including fact that defendant knew where firearm was concealed and informed officer of its exact location, apologized to girlfriend for bringing firearm into apartment, and admitted that he had stolen firearm in order to protect himself while dealing drugs. 18 U.S.C.A. § 922(g)(1).

15. Criminal Law ⇐1042.3(1)

Any mistake by district court in treating defendant's current possessory firearms offense as "crime of violence," of kind that supported enhancement of his sentence, based on fact that the firearm possessed was characterized as "sawed-off shotgun" in presentence investigation report (PSI), was reviewable only for plain error, where defendant never objected either to the PSI's characterization of firearm as "sawed-off shotgun" or to district court's treatment of his current offense as "crime of violence." 28 U.S.C.A. § 5845(a); U.S.S.G. §§ 4B1.1(a), 4B1.4(b), 18 U.S.C.A.

16. Criminal Law ⇐1030(1)

To demonstrate plain error, defendant bears burden of establishing that: (1) there was error; (2) which was plain or obvious; (3) which affected his substantial rights in that it was prejudicial and not harmless; and (4) which seriously affected fairness, integrity or public reputation of judicial proceedings.

17. Criminal Law ⇐1030(1)

Court of Appeals exercises "plain error" review sparingly and only in those circumstances in which miscarriage of justice would otherwise result.

18. Sentencing and Punishment ⇐299, 1237

District court did not err, let alone plainly error, in relying on the presentence investigation report's (PSI's) characterization of firearm that defendant was convicted of possessing as "sawed-off shotgun" in treating his current offense as "crime of violence," for purpose of enhancing his sentence under Sentencing Guideline, where defendant, despite making six objections to PSI, never once objected to its characterization of firearm recovered from his and his girlfriend's apartment. 26 U.S.C.A. § 5845(a); U.S.S.G. §§ 4B1.1(a), 4B1.4(b), 18 U.S.C.A.

19. Sentencing and Punishment ⇐1237

To determine whether defendant's firearm possession offense was "crime of violence," for purposes of enhancing his sentence based on his violent criminal history, district court could look outside the offense of conviction to the conduct surrounding that conviction, if ambiguities in judgment made the "crime of violence" determination impossible from face of judgment itself. U.S.S.G. §§ 4B1.1(a), 4B1.4(b), 18 U.S.C.A.

20. Sentencing and Punishment ⇐1244

To determine whether defendant's instant offense was "crime of violence," for purposes of enhancing his sentence based on his violent criminal history, district court, in attempt to resolve ambiguity in judgment of conviction, could rely on charging document, written plea agreement, transcript of plea colloquy, and any explicit factual findings to which defendant had assented, including undisputed statements found in presentence investigation report (PSI).

21. Sentencing and Punishment ⇐299

Facts contained in presentence investigation report (PSI) are undisputed and deemed to have been admitted, unless party objects to them before the sentencing court with specificity and clarity.

22. Sentencing and Punishment ⇐299

Failure to object to allegations of fact in presentence investigation report (PSI) admits those facts for sentencing purposes, and precludes argument that there was error in them.

23. Criminal Law ⇐1042.3(1)

Even assuming that district court, in treating defendant's current offense as "crime of violence," committed error that

was plain or obvious based on its reliance on presentence investigation report's (PSI's) characterization of firearm that defendant was convicted of possessing as "sawed-off shotgun," error was not shown to have affected defendant's substantial rights, and could not be corrected on plain error review, given complete lack of evidence that firearm that defendant possessed was not sawed-off shotgun. 26 U.S.C.A. § 5845(a); U.S.S.G. §§ 4B1.1(a), 4B1.4(b), 18 U.S.C.A.

24. Criminal Law ⇐1030(1)

Third, or "prejudice," prong of "plain error" test almost always requires that the error must have affected outcome of district court proceedings, and standard for showing that outcome was affected is the familiar "reasonable probability of a different result" formulation, which is a probability sufficient to undermine confidence in outcome.

See publication Words and Phrases for other judicial constructions and definitions.

25. Criminal Law ⇐1141(2)

It is defendant who bears burden of persuasion with respect to third, or "prejudice," prong of "plain error" test.

26. Criminal Law ⇐1030(1)

Defendant fails to satisfy the third, or "prejudice," prong of "plain error" test if it is equally plausible that error worked in favor of defense, or if effect of error is uncertain, such that appellate court does not know which, if either, side it helped.

27. Criminal Law ⇐1158.2

Reviewing a sentence for reasonableness merely asks whether the district court abused its discretion.

28. Criminal Law ⇐1134.75, 1134.77

On challenge to reasonableness of sentence imposed, the Court of Appeals engages in two-step process, under which it first determines whether district court committed any significant procedural error, such as failing to calculate, or improperly calculating, the Guidelines range, and then, if there was no procedural error, considers substantive reasonableness of sentence imposed under abuse-of-discretion standard, based on totality of circumstances.

29. Criminal Law ⇐1141(2)

Party who challenges sentence bears burden of establishing that sentence is unreasonable in light of both the record and statutory sentencing factors. 18 U.S.C.A. § 3553(a).

30. Sentencing and Punishment ⇐373

District court need only acknowledge that it considered the statutory sentencing factors, and need not discuss each of those factors either at sentencing hearing or in sentencing order. 18 U.S.C.A. § 3553(a).

31. Sentencing and Punishment ⇐1424

Sentence of 360-months imprisonment imposed on armed career criminal convicted of unlawfully possessing sawed-off shotgun was not unreasonable, though district court allegedly failed to adequately consider statutory sentencing factors and mitigating factors such as defendant's troubled childhood and drug addiction, where district court explicitly stated that it had given careful consideration to statutory factors, and that sentence imposed was needed to account for serious nature of offense and need to provide deterrence and to safeguard the community. 18 U.S.C.A. § 3553(a).

32. Sentencing and Punishment ⇐1385, 1390(2)

Government did not need not prove beyond a reasonable doubt that defendant had prior violent felony or serious narcotics convictions, or allege those prior con-

victions in indictment, in order to rely thereon in sentencing defendant as armed career criminal. 18 U.S.C.A. § 924(e).

Margaret Y. Foldes, Michael David Spivack, Asst. Fed. Pub. Defenders, Kathleen M. Williams, Fed. Pub. Def., Miami, FL, for Beckles.

Kathleen M. Salyer, Anne R. Schultz, Kelly S. Karase, Miami, FL, for U.S.

Appeal from the United States District Court for the Southern District of Florida.

Before BIRCH and MARCUS, Circuit Judges, and FORRESTER,* District Judge.

MARCUS, Circuit Judge:

Travis Beckles appeals from his conviction and sentence for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g). He claims that his conviction should be overturned both because the district court erred in denying his motion to suppress his post-arrest statements, and because the evidence was insufficient to permit a reasonable jury to find beyond a reasonable doubt that he knowingly possessed a firearm. Finally, Beckles argues that his sentence should be reversed because: (1) the district court plainly erred in sentencing him as a career offender under § 4B1.1 of the United States Sentencing Guidelines; (2) the sentence was unreasonable; and (3) the sentence violated the Fifth and Sixth Amendments to the United States Constitution since facts about his prior convictions were not found by the jury or charged in the indictment. After thorough review, we affirm both the conviction and the sentence.

I.

On April 24, 2007, Beckles was indicted by a federal grand jury in the United States District Court for the Southern District of Florida for possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g) and 924(e). Shortly thereafter, he moved to suppress all of the post-arrest statements he made to the Federal Bureau of Investigation ("FBI"), arguing that they were obtained in violation of his Fifth Amendment right to remain silent, due process, and *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

A. *The Suppression Hearing*

After conducting an evidentiary hearing on the motion to suppress, the magistrate judge determined that the defendant was fully advised of his *Miranda* rights, understood his rights, and voluntarily, knowingly and intelligently waived them before speaking to Special Agent John Jefferson of the FBI. During the evidentiary hearing, the government presented testimony from Special Agent Jefferson, who interviewed Beckles on the day of his arrest and was present when the defendant was read his *Miranda* rights. Jefferson testified that Beckles was not only read his *Miranda* rights but that Beckles also initialed each line of a written copy of those rights after they were read aloud to him to indicate his understanding. Beckles then signed the entire *Miranda* rights form.

Special Agent Jefferson added that Beckles signed a form indicating that he was not under the influence of alcohol or

* Honorable J. Owen Forrester, United States District Judge for the Northern District of Georgia, sitting by designation.

drugs and understood English. Jefferson also said that Beckles did not evince any difficulty in understanding the documents that were read to him, or that Beckles was under the influence of any drugs, alcohol, or medication. He testified that Beckles never requested an attorney during the interview nor gave any indication he wished an attorney to be present. Finally, Jefferson said that Beckles cooperated throughout the interview and even volunteered to assist the government as an informant.

Beckles also testified at the suppression hearing, giving an account at war with that of Special Agent Jefferson. Beckles claimed that he told Jefferson he wanted to consult with a lawyer and that he only initialed and signed the written copy of his *Miranda* rights because he was advised that he could not speak to a lawyer until the paper was signed. Beckles also testified that he did not tell the law enforcement officers he could read and write English, and signed the form indicating he could only because he was under the influence of marijuana. Beckles added that he did not understand what was going on during the interview, and explained that he had difficulty reading English but that he could understand spoken English.

The magistrate judge specifically credited Jefferson's account of his meeting with the defendant, finding that the defendant was fully afforded *Miranda* warnings orally and in writing, that the defendant understood his rights, and that the defendant knowingly and voluntarily answered the agent's questions. The district court adopted the magistrate judge's Report and Recommendation and denied the motion to suppress.

B. *The Trial*

Beckles was tried and convicted on all counts by a jury. The government adduced the following evidence. On April 11, 2007, while Miami Dade Detective Diego Castro was investigating a different case, he saw Beckles loitering in a public facility. When Castro, who was wearing a vest and shirt identifying himself as a police officer, exited his car, the defendant fled on foot. Castro followed Beckles, identified himself as a police officer, and instructed the defendant to stop running. Beckles fled to a nearby apartment. Castro heard screams from the apartment, and, after he knocked on the door, a woman, Tiovanni Jones, emerged and told Castro to remove Beckles (whom she claimed not to know) from her apartment. Castro took Beckles into custody and placed him in a police car.

After Beckles was secured, Detective Castro spoke to Jones, who this time said that Beckles was her boyfriend, that he lived in the apartment at least part-time, and that he helped her pay the rent. Jones also claimed that there was a gun in the bedroom that she wanted removed for the safety of her child. After obtaining her permission to search the bedroom, Castro was unable to locate the gun. Castro then asked Beckles where the firearm was located. The defendant told Castro that there was a gun under the bed, but Castro was still unable to find it. Castro then brought Beckles into the apartment and Beckles told him that there was a shotgun under the mattress. Castro recovered the shotgun.

The prosecution also presented the testimony of Jones, who said that she lived in the apartment with her six-year-old son and her sister and that Beckles was her part-time live-in boyfriend. Jones added that neither she nor her sister kept a firearm in the apartment.

Later that day, FBI agents returned to Jones's apartment and photographed clothing and other items belonging to Beckles, including a toothbrush, a watch,

and identification. Finally, the government offered at trial the testimony of Special Agent Jefferson, who said that, after being read his *Miranda* rights, Beckles acknowledged that he was a drug dealer associated with a street gang, that he acquired the shotgun for protection, and that he kept the firearm in the apartment where he lived.

The government presented two stipulations of fact: that the defendant had been convicted in May 2004 of a felony crime punishable by imprisonment for a term exceeding one year; and that the Browning shotgun recovered by Detective Castro on April 11, 2007 had traveled in commerce.

The defendant rested without presenting any additional witnesses.

C. *The Sentence*

The Presentence Investigation Report ("PSI") reported that the offense of conviction was subject to a 15-year minimum term of imprisonment and a maximum of life. According to the PSI, "Detective Castro ... recovered a sawed off Browning shotgun underneath the mattress" in the bedroom of Jones's apartment after Beckles told him that was where the gun was located. (PSI ¶ 6). It calculated his base offense level at 26, because an 18 U.S.C. § 922(g)(1) offense involves, among other things, a "firearm that is described in 26 U.S.C. § 5845(a)." (PSI ¶ 12). The PSI also found that Beckles is an armed career criminal subject to an enhanced sentence under 18 U.S.C. § 924(e) and the career offender provision contained in § 4B1.1 of the Sentencing Guidelines, because Beckles was 18 years old at the time of the instant offense, "the instant offense is a felony crime of violence (unlawful possession of a sawed-off shotgun)," and Beckles had two prior controlled substance felony convictions. (PSI ¶ 18). Thus, it calculated that Beckles had a total offense level of 37.

The PSI set forth Beckles's criminal history which included, in relevant part: (1) five convictions for possession with the intent to sell, manufacture, or deliver cocaine; (2) marijuana and cannabis possession offenses for which adjudication was withheld; and (3) a conviction for burglary of an unoccupied structure. Beckles's criminal history category was raised from V to VI, because he was a career offender under § 4B1.1. Based on a total offense level of 37 and a criminal history category of VI, the guidelines range was 360 months' to life imprisonment, including a mandatory minimum sentence of 15 years under 18 U.S.C. § 924(e)(1). The PSI also noted that Beckles was 24 years old; was abandoned by his parents at the age of five; described his childhood as "crazy"; began using drugs and having legal problems at a young age; and has a six-year-old son with a brain tumor who is undergoing chemotherapy. It also stated that the woman who raised Beckles said that he had a drug problem and could not read or write.

Beckles objected to the PSI, arguing that (1) the Sentencing Guidelines provided an excessive sentence; (2) police reports or other impermissible sources were used to calculate his criminal history category improperly; (3) the government did not prove the prior convictions required for the 18 U.S.C. § 924(e) enhancement; (4) none of his prior state drug convictions qualified as serious drug offenses under 18 U.S.C. § 924(e) and the government should have been required to charge his prior felonies in the indictment and prove them beyond a reasonable doubt; (5) the enhancement pursuant to § 4B1.1 was unconstitutional because it relied on facts pertaining to Beckles's prior convictions not alleged in the indictment or proven to

a jury beyond a reasonable doubt; and (6) applying the 18 U.S.C. § 924(e) enhancement was unconstitutional. Notably, Beckles did not object to the PSI's characterization of the firearm as a sawed-off shotgun or the enhancement of his offense level due to the classification of his current conviction as a felony crime of violence under § 4B1.1.

The district court conducted a sentencing hearing on October 17, 2007, during which the government put on a Miami-Dade Police Department fingerprint analyst to confirm that Beckles's fingerprints matched those on the certified Florida state court convictions ascribed to him for purposes of finding that his conduct fell within the career offender provision of the Sentencing Guidelines. The court concluded that the government had established the defendant's prior convictions and that the defendant qualified as an armed career criminal. The trial judge said the following:

> The defendant is considered a career offender because he was at least 18 at the time of this offense. This offense is a felony crime of violence, the unlawful possession of a sawed-off shotgun, and the defendant has at least two prior felony convictions of a controlled substance offense. The offense level, as noted in paragraph 18 of the presentence report, goes from an adjusted offense level of 26 up to 37 under the Sentencing Guideline § 4B1.1(b). So the defendant has started off today's sentencing hearing with an offense level of 37, a criminal history category of 6 and the Guidelines recommend a sentence of, at the low end, 360 months up to life.

The district court explained its sentence this way: "Beckles's long and continuous life of crime was never appropriately addressed at the State Court level. In other words . . the defendant has 18 arrests that resulted in convictions and/or juvenile adjudications" and he is only 24 years old. (*Id.* at 40–41). It concluded "[t]hat's a pretty extensive criminal history. It's pretty continuous . . . . [W]hat stands out is that the defendant was never appropriately punished for any of his prior felony convictions." (*Id.* at 41). The district court added that it had "given careful consideration to the statutory factors contained in 18 U.S.Code § 3553," and that it was "mindful of the need to have this sentence reflect upon the seriousness of the offense, provide deterrence and safeguard the community from you, Mr. Beckles, because you have shown that you cannot live within the law." (*Id.* at 43). A sentence of 360 months of imprisonment, five months of supervised release, and a $5,000 fine was imposed.

This timely appeal ensued.

II.

A. *Motion to Suppress*

[1, 2] First, Beckles argues that his conviction must be reversed because the incriminating post-arrest statements he made to Special Agent Jefferson should have been suppressed. In as much as a ruling on a motion to suppress is a mixed question of law and fact, we review the district court's findings of fact for clear error and the application of the law to those facts *de novo*. *United States v. Zapata*, 180 F.3d 1237, 1240 (11th Cir.1999). We construe all facts in favor of the prevailing party (here the government). *United States v. Bervaldi*, 226 F.3d 1256, 1262 (11th Cir.2000).

[3–5] Under the Fifth Amendment, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *Miranda*, the Supreme Court held that the

government may not use statements stemming from the custodial interrogation of a criminal defendant unless the government demonstrates that it used procedural safeguards to ensure the privilege against self-incrimination remains intact. 384 U.S. at 444, 86 S.Ct. 1602. In particular, a defendant may waive his right against self-incrimination only if he does so "voluntarily, knowingly and intelligently." *Id.* A defendant's waiver of his *Miranda* rights is voluntary, knowing and intelligent if "it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). A written waiver "is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver." *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

[6] When the facts are construed in a light most favorable to the government, there can be little question that Beckles made a voluntary, knowing, and intelligent waiver of his *Miranda* rights. Special Agent Jefferson testified that Beckles: (1) was read his *Miranda* rights; (2) indicated in writing that he understood his *Miranda* rights and was aware of the rights that he would give up if he chose to speak; (3) indicated in writing that he was not under the influence of drugs or alcohol; (4) did not appear to be under the influence of drugs or alcohol; (5) indicated in writing that he could understand English; (6) appeared to understand English and spoke with Jefferson in English; and (7) did not request an attorney or indicate that he did not wish to speak with law enforcement officers.

While Beckles did provide contradictory testimony, the district court made a detailed credibility determination in favor of the FBI agent's version of the events, and this decision was not clearly erroneous. *See United States v. Delancy*, 502 F.3d 1297, 1306 (11th Cir.2007) (explaining that factual findings are not clearly erroneous where the district court makes detailed credibility determinations that it does not believe a witness's claim at a hearing on a motion to suppress). In particular, the magistrate judge, whose Report and Recommendation was adopted in full by the district court after a *de novo* review, explained that he chose to credit Special Agent Jefferson's account, and not Beckles's. In short, the district court did not err in denying Beckles's motion to suppress Beckles's incriminating post-arrest statements.

B. *Sufficiency of the Evidence*

Beckles also claims that his conviction must be reversed because it was supported by insufficient evidence. We remain unpersuaded.

[7–9] We review *de novo* whether there is sufficient evidence in the record to support a jury's verdict in a criminal trial, viewing the evidence in the light most favorable to the government, and drawing all reasonable factual inferences in favor of the jury's verdict. *United States v. Williams*, 144 F.3d 1397, 1401 (11th Cir. 1998). Accordingly, the evidence will be sufficient to support a conviction if "a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt." *United States v. Calhoon*, 97 F.3d 518, 523 (11th Cir.1996). In rebutting the government's evidence "[i]t is not enough for a defendant to put forth a reasonable hypothesis of innocence, because the issue is not whether a jury reasonably could have acquitted but whether

it reasonably could have found guilt beyond a reasonable doubt." *United States v. Thompson*, 473 F.3d 1137, 1142 (11th Cir.2006).

[10] To establish a violation of 18 U.S.C. § 922(g)(1), the government must prove three elements: "(1) that the defendant was a convicted felon, (2) that the defendant was in knowing possession of a firearm, and (3) that the firearm was in or affecting interstate commerce." *United States v. Delesenne*, 206 F.3d 1292, 1296–97 (11th Cir.2000). Beckles contests only the second element—that he did not knowingly possess a firearm.

[11–13] "The government need not prove actual possession in order to establish knowing possession; it need only show constructive possession through direct or circumstantial evidence." *United States v. Greer*, 440 F.3d 1267, 1271 (11th Cir.2006). "Constructive possession exists when the defendant exercises ownership, dominion, or control over the item or has the power and intent to exercise dominion or control." *Id.* However, "a defendant's mere presence in the area of [an object] or awareness of its location is not sufficient to establish possession." *United States v. Pedro*, 999 F.2d 497, 500–01 (11th Cir. 1993) (quotation marks omitted).

[14] Here, the evidence, viewed in the light most favorable to the jury's determination, amply supports the verdict. Among other things, the government established that: (1) Beckles was Jones's boyfriend and lived at her apartment; (2) Beckles helped pay the rent; (3) Beckles's belongings were kept at the apartment, including his clothing, his toothbrush, his watch, and his identification; (4) the Browning shotgun was recovered in Jones's apartment; (5) Beckles knew where the shotgun was concealed and told Detective Castro its exact location; (6) Beckles apologized to Jones for bringing the shotgun into the apartment; (7) the shotgun did not belong to Jones or any of the other occupants or guests at the apartment; and (8) Beckles said that he possessed the shotgun, and that he stole it to protect himself while dealing drugs. Thus, there was ample evidence to support the jury's finding that Beckles knowingly possessed the firearm. Indeed, most strikingly, Beckles admitted to Special Agent Jefferson that he had ownership and control over the shotgun and this testimony went uncontradicted at trial.

C. *Application of § 4B1.1 of the Sentencing Guidelines*

Beckles also says that his sentence must be reversed because, contrary to the finding of the district court, his conviction under 18 U.S.C. § 922(g) was not a "crime of violence" under § 4B1.1 of the Sentencing Guidelines. In particular, he claims that the district court erred by looking behind the face of his 18 U.S.C. § 922(g) conviction to make a finding that Beckles possessed a sawed-off shotgun within the meaning of 26 U.S.C. § 5845(a) and by increasing the Sentencing Guidelines calculation accordingly.

Due to multiple prior felonies, Beckles's violation of 18 U.S.C. § 922(g) subjected him to the enhanced penalty provision of 18 U.S.C. § 924(e)(1) and the district court found him to be an armed career criminal pursuant to that statute. This finding, in turn, qualified Beckles for a sentence enhancement under § 4B1.4. That provision of the Sentencing Guidelines instructs that the appropriate offense level is the greater of: (1) the applicable offense level from Chapters 2 and 3 of the Sentencing Guidelines; (2) the offense level described in § 4B1.1, if applicable; (3) level 34, if the firearm possessed was of a type described

in 26 U.S.C. § 5845(a); or (4) level 33. U.S.S.G. § 4B1.4(b).

Section 4B1.1, in turn, applies if:

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a). In particular, the Sentencing Guidelines specify that a "'[c]rime of violence' does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a)," and then reiterate that "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'" U.S.S.G. § 4B1.2 Application Note 1.[1]

At sentencing, the district court found that § 4B1.1 was applicable and that it yielded the greatest offense level, reasoning that two of Beckles's prior felony convictions were for qualified controlled substances offenses, and the current 18 U.S.C. § 922(g) conviction was for a "crime of violence" because the firearm Beckles knowingly possessed was a sawed-off shotgun as defined in 26 U.S.C. § 5845(a).

On appeal, Beckles argues that § 4B1.1 does not apply to him because the instant conviction under 18 U.S.C. § 922(g) is not for a "crime of violence." Specifically, he suggests that he was convicted of unlawful possession of a firearm by a felon, not of unlawful possession of a 26 U.S.C. § 5845(a) firearm by a felon.

[15–17] Despite making six objections to the PSI (including one to the application of § 4B1.1) and five amendments to his sentencing memorandum, Beckles never objected to the PSI's characterization of the firearm as a sawed-off shotgun or to the PSI's or district court's enhancement of his offense level under § 4B1.1 because his current conviction was for a felony crime of violence. Accordingly, we review the district court's decision for plain error. *See e.g., United States v. Rond*, 406 F.3d 1322, 1323 (11th Cir.2005). To demonstrate plain error, Beckles has the burden of establishing that "(1) there is an error; (2) that is plain or obvious; (3) affecting [his] substantial rights in that it was prejudicial and not harmless; and (4) that seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *Id.* (quotation marks and citation omitted). We may exercise this review "sparingly and only in those circumstances in which a miscarriage of justice would otherwise result." *United States v. Rodrigues*, 398 F.3d 1291, 1298 (11th Cir.2005) (quotation marks and citation omitted). There can be little doubt this is a difficult and daunting hurdle for the appellant to cross, and Beckles has not done so today.

[18, 19] Indeed, Beckles has not established that there is any error, let alone that any such error is plain. To determine whether the instant offense is a "crime of violence" for purposes of enhancing a sentence under § 4B1.1, a district court may look outside of the "offense of conviction" to the conduct surrounding that conviction "if ambiguities in the judgment make the crime of violence determination impossible

1. The commentary and application notes of the Sentencing Guidelines are authoritative, unless they are plainly erroneous, inconsistent with the regulation they interpret, or contrary to the Constitution or federal law. *Stinson v. United States*, 508 U.S. 36, 45, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993); *United States v. Tornalba*, 339 F.3d 1238, 1242 (11th Cir.2003).

from the face of the judgment itself." *United States v. Spell*, 44 F.3d 936, 939–40 (11th Cir.1995); *United States v. Young*, 527 F.3d 1274, 1277 (11th Cir.2008) (same); *United States v. Owens*, 447 F.3d 1345, 1347 (11th Cir.2006) (same). Accordingly, we have permitted district courts to find additional facts when the crime for which the defendant was convicted encompasses both conduct that constitutes a crime of violence and conduct that does not constitute a crime of violence.[1] *See e.g., United States v. Aguilar-Ortiz*, 450 F.3d 1271, 1276 (11th Cir.2006) (finding prior state judgment of conviction ambiguous because the Court was unable to say as a categorical matter that all convictions under it qualified as a "drug trafficking offense" under § 2L1.2(b)(1)(B)); *Spell*, 44 F.3d at 939 (holding that a prior state judgment of conviction for burglary was ambiguous because it encompassed some conduct which constituted a crime of violence and some which did not); *see also Greer*, 440 F.3d at 1273 (noting that the defendant's prior convictions for making terrorist threats under a Georgia statute did "not, without more, prove that he has been convicted of a violent felony for ACCA purposes" because the state statute prohibits both violent and non-violent conduct); *see also United States v. Dwyer*, 245 F.3d 1168, 1171 (10th Cir.2001) ("If the statute is ambiguous, or broad enough to encompass both violent and nonviolent crimes, a court can look beyond the statute to certain records of the prior proceeding.") (quotation marks omitted).

Here, an ambiguity does exist. Plainly, a violation of 18 U.S.C. § 922(g)(1) encompasses both conduct that the Sentencing Guidelines explicitly says is not a crime of violence and conduct that the Sentencing Guidelines explicitly denominates as a crime of violence. All that is required to violate 18 U.S.C. § 922(g) is that a convicted felon knowingly possess any firearm. Thus, this conviction encompasses conduct involving the possession of a standard firearm as well as the possession of a firearm that specifically meets the criteria of 26 U.S.C. § 5845(a). The distinction between these two categories is important, because Congress and the Sentencing Commission have chosen to subject only those who possess 26 U.S.C. § 5845(a) firearms—which include, among other things, sawed-off shotguns that are less than 26 inches overall in length or have barrels that are less than 18 inches in length—to longer sentences, since those firearms "are inherently dangerous and when possessed unlawfully serve only violent purposes." U.S.S.G. Appx. C. Amend. 674 (2004).

[20] Where an ambiguity exists and the underlying conviction may be examined, the district court can rely on the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Aguilar-Ortiz*, 450 F.3d at 1276 (*quoting Shepard v. United States*, 544 U.S. 13, 16, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)). For purposes of sentencing, the district court also may base its factual findings on undisputed statements found in the PSI, because they are factual findings to which the defendant has assented. *See United States v. Bennett*, 472 F.3d 825, 832–34 (11th Cir.2006).

2. Although all of the prior cases in our Circuit discussing when a judgment of conviction is ambiguous for purposes of § 4B1.1 address prior convictions, as opposed to the instant conviction, that difference gives us no pause. The law that applies to evaluating prior convictions surely applies with equal force to the evaluation of the instant conviction, particularly because the Sentencing Guidelines contain the same definition of "crime of violence" for both prongs of § 4B1.1(a).

[21, 22] Facts contained in a PSI are undisputed and deemed to have been admitted unless a party objects to them before the sentencing court "with specificity and clarity." *Id.* at 822 (concluding that an objection to the probation officer's use of non-*Shepard* materials in preparation of the PSI did not amount to a dispute of the facts). "It is the law of this circuit that a failure to object to allegations of fact in a PSI admits those facts for sentencing purposes" and "precludes the argument that there was error in them." *United States v. Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006); *Bennett*, 472 F.3d at 832 ("A sentencing court's findings of fact may be based on undisputed statements in the PSI. Where a defendant objects to the factual basis of his sentence, the government has the burden of establishing the disputed fact .... Otherwise, the objection is waived."). Indeed, the defendant's failure to object to conclusory statements in the PSI renders those statements undisputed and permits the sentencing court to rely upon them without error even if there is an absence of supporting evidence. *United States v. Hedges*, 175 F.3d 1312, 1315 (11th Cir.1999).

Beckles's PSI repeatedly stated that the firearm he was convicted of knowingly possessing was a *sawed-off shotgun*. First, the PSI specified that "Detective Castro then recovered a sawed off Browning shotgun" (PSI ¶ 6), and observed, in making its base offense level calculation, that the offense involved "a semi-automatic firearm that is capable of accepting a large capacity magazine; or ... [a] firearm that is described in 26 U.S.C. § 5845(a)." (PSI ¶ 12). In explaining the applicable Chapter Four enhancements, the PSI also stated that "[t]he defendant is considered a career offender because he was at least 18 years old at the time of the instant offense, the instant offense is a felony crime of violence (unlawful possession of a sawed-off shotgun)...." (PSI ¶ 18). The district court relied upon these undisputed facts found in the PSI and sentenced Beckles accordingly as a career offender under § 4B1.1. We can discern no error in the district court's reliance on these facts in the PSI to sentence Beckles for possession of a sawed-off shotgun.[3]

[23–26] But, even if Beckles had demonstrated error and that error was plain or obvious, his argument still could not succeed because he is unable to show that his substantial rights were affected by the error. The third prong of the plain error test "almost always requires that the error must have affected the outcome of the district court proceedings." *Rodriguez*, 398 F.3d at 1299 (quotation marks and citations omitted). "The standard for showing that is the familiar reasonable probability of a different result formulation, which means a probability sufficient to undermine confidence in the outcome." *Id.* (quotation marks and citations omitted). Thus, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). In that vein,

> if it is equally plausible that the error worked in favor of the defense, the defendant loses; if the effect of the error is uncertain so that we do not know which, if either, side it helped the defendant loses. Where errors could have cut either way and uncertainty exists, the burden is the decisive factor in the third

3. We note in passing that Beckles has not objected to the district court's finding that at least two of his prior state convictions were for controlled substance offenses that meet the requirements of § 4B1.1.

prong of the plain error test, and the burden is on the defendant.

Rodriguez, 398 F.3d at 1300.

Simply put, on the record before us, the effect of the alleged error is uncertain; therefore, Beckles would lose even if he could show obvious error. No evidence has been adduced regarding the length and size of the shotgun possessed by Beckles, and Beckles has submitted nothing showing that the firearm was not, in fact, a sawed-off shotgun under 26 U.S.C. § 5845(a). Indeed, his attorney said at oral argument that she was unaware of the actual length of the firearm, and that it had been destroyed by the United States Marshals Service pursuant to an unopposed forfeiture order issued on December 21, 2007. Because we do not know whether the firearm Beckles possessed would have qualified Beckles as a career offender, we could do nothing other than speculate. Where such speculation is required to resolve the dispute, the appellant has not met and cannot meet "his burden of showing a reasonable probability that the result would have been different but for the error; he has not met his burden of showing prejudice; he has not met his burden of showing that his substantial rights have been affected." *Rodriguez*, 398 F.3d at 1301.

D. *Reasonableness*

[27–29] Beckles also claims that his sentence should be reversed because it is an unreasonable one. Reviewing a sentence for reasonableness "merely asks whether the trial court abused its discretion." *United States v. Pugh*, 515 F.3d 1179, 1189 (11th Cir.2008) (*quoting Rita v. United States*, 551 U.S. 338, 127 S.Ct. 2456, 2465, 168 L.Ed.2d 203 (2007)). Our reasonableness review consists of two steps. *Id.* at 1190. First, we must

> ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.

Id. (*quoting Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586, 597, 169 L.Ed.2d 445 (2007)).[4] If the district court did not procedurally err, then we must consider the "substantive reasonableness of the sentence imposed under an abuse-of-discretion standard," based on the "totality of the circumstances." *Id.* (*quoting Gall*, 128 S.Ct. at 597). "The party who challenges the sentence bears the burden of establishing that the sentence is unreasonable in the light of both th[e] record and the factors in section 3553(a)." *United States v. Thomas*, 446 F.3d 1348, 1351 (11th Cir. 2006) (quotation marks omitted).

[30, 31] Beckles says his sentence is unreasonable because the district court failed to adequately consider the § 3553(a) factors and mitigating factors such as his troubled childhood, drug addiction, and ill child. But, at sentencing, the district court explicitly stated that it had "given

4. The § 3553(a) factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense; (3) the need for the sentence imposed to afford adequate deterrence; (4) the need to protect the public; (5) the need to provide the defendant with educational or vocational training or medical care; (6) the kinds of sentences available; (7) the Sentencing Guidelines range; (8) the pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwanted sentencing disparities; and (10) the need to provide restitution to victims. 18 U.S.C. § 3553(a).

careful consideration to" the factors found in 18 U.S.C. § 3553(a), that Beckles had committed a serious offense, and that there was a need to provide deterrence and safeguard the community from him. The record thus reflects the district court's adequate consideration of the § 3553(a) factors. In fact, "the district court need only acknowledge that it considered the § 3553(a) factors, and need *not* discuss each of these factors in either the sentencing hearing or in the sentencing order." *United States v. Amedeo*, 487 F.3d 823, 833 (11th Cir.2007) (quotation marks and punctuation omitted); *United States v. Talley*, 431 F.3d 784, 786 (11th Cir.2005) (stating that "an acknowledgment by the district court that it has considered the defendant's arguments and the factors in section 3553(a) is sufficient under *Booker*"). Accordingly, Beckles's sentence cannot be reversed on this ground.

E. *Imposition of 18 U.S.C. § 924(e) sentence*

[32] Finally, Beckles argues that the district court violated the Fifth and Sixth Amendments to the United States Constitution when it applied 18 U.S.C. § 924(e), because the application of that provision—which instructs that district courts must impose a mandatory minimum sentence of 15 years upon anyone convicted of violating 18 U.S.C. § 922(g) who also has three previous violent felony or serious drug offense convictions committed on different occasions—was based upon facts about Beckles's prior convictions that were not found by the jury or charged in the indictment.

The Supreme Court has rejected Beckles's argument. In *Almendarez-Torres v. United States*, 523 U.S. 224, 247, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), the Court held that the government need not prove beyond a reasonable doubt that a defendant had prior convictions or allege those prior convictions in the indictment in order to use those convictions to enhance a defendant's sentence. This Court has confirmed repeatedly that *Almendarez-Torres* is good law and that "a district court does not err by relying on prior convictions to enhance a defendant's sentence." *United States v. Shelton*, 400 F.3d 1325, 1329 (11th Cir.2005); *see United States v. Dowd*, 451 F.3d 1244, 1258 (11th Cir.2006) (explaining that "we are bound by *Almendarez-Torres* until it is explicitly overruled by the Supreme Court"); *Greer*, 440 F.3d at 1273–76 (expressly rejecting the argument that a judge is forbidden by *Booker* and *Apprendi* from determining the factual nature of the prior conviction in vacating the district court's refusal to impose the 18 U.S.C. § 924(e) mandatory minimum sentence because the jury did not determine whether the defendant's three prior convictions were for violent felonies).

Accordingly, we AFFIRM the conviction and sentence in all respects.

AFFIRMED.

AMGEN, INC., Appellant,

v.

INTERNATIONAL TRADE COMMISSION, Appellee,

and

Roche Holding Ltd., F. Hoffmann-La Roche Ltd., Roche Diagnostics GmbH, and Hoffman-La Roche Inc., Intervenors.

No. 2007-1014.

United States Court of Appeals, Federal Circuit.

April 30, 2009.

Background: Patentee appealed from a decision of the International Trade Com-